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UNILATERAL USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD AND PRESENT INTERNATIONAL LAW

by

© TCHUPA N. CHIBAMBO

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TO MY PARENTS

CHRIS AND NORTON CHIBAMBO

ABSTRACT

One aspect of the attempts to determine the lawful and unlawful resort to force by states under present international law relates to the question of whether a state can lawfully land its armed forces on foreign territory for the purpose of protecting its nationals. The right of armed protection of nationals abroad was generally admitted under customary international law during the nineteenth and early twentieth centuries. The development of international law during the period since the end of the First World War has, however, fostered legal principles which heavily lean against the unilateral use of force by individual states. Conflicting interpretations of these principles, and the emergence of many new states who have tended to challenge some of the principles established in earlier times, have generally rendered uncertain the legal status of the use of force in the protection of nationals abroad. On the whole, however, there is a strong case for the view that a narrowly defined right to resort to force in the protection of nationals abroad still exists under modern international law. And the purpose of the following discussion is to show this by examining the customary international law position and how that position has been affected by the League of Nations Covenant, the Charter of the United Nations, and other related instruments governing the use of force by states. And more importantly, the view that a

narrowly defined right to resort to force in the protection of nationals abroad still exists will further be demonstrated by an analysis of specific post-1945 instances of such use of force.

PREFACE

This study deals with one of the controversial issues of present international law, namely, the legal status of the unilateral use of force by states in the protection of nationals abroad. The central concern is whether or not the use of force in the protection of nationals abroad is legally permissible under post-1945 international law. The study must be viewed as an aspect of discussions relating to the question: to what extent under post-1945 international law can one state in the exercise of its right of protection lawfully employ force which has as an incidental consequence the violation of the sovereignty of another state? Viewed in this way, the study clearly excludes cases involving the landing of troops on foreign territory with the express authorization of the local sovereign, for example, the 1976 German commando raid at Mogadishu, Somalia. Strictly speaking, such cases do not involve any violation of the sovereignty of another state. In the examination of post-1945 state practice which appears in the last chapter of the study, one or two of these cases have been included only because they incidentally throw some special light on the subject central to the study.

There is no doubt that there is a close relationship between the themes of this study and the institution of State Responsibility for Injuries to Aliens. However, an effort has been made to confine the discussion to the subject of use

of force. Only incidentally have references been made to some aspects of the institution of State Responsibility. Some important principles governing that institution are merely assumed in the study. It is also necessary to mention that it is the use of force as a protective measure and not as a punitive or enforcement measure on behalf of nations abroad that forms the core of the whole exercise.

The thrust of the study of course relates to international law during the period after the Second World War. However, an appreciation of theory and practice of pre-1945 international law is invaluable if a fuller understanding is to be achieved of current issues relative to the use of force in the protection of nationals abroad. Indeed, one enduring theme in this study involves the evaluation of the effect of post-1945 principles of international law on the customary law "right of intervention to protect nationals abroad", especially in the form this "right" took during the nineteenth and early twentieth centuries. Accordingly, the first chapter of the study is devoted to a survey of doctrine and practice of pre-1945 international law relative to the use of force by states. An attempt is made to determine the extent to, and the way in which traditional international law governed the use of force by states in the protection of nationals abroad. The first chapter also helps to present the subject of use of force in the protection of nationals abroad in a more complete historical perspective.

In the three chapters following the discussion of

pre-1945 international law, the use of force in the protection of nationals abroad is related to:

1. Article 2(4) of the Charter of the United Nations and the general concepts of "nonintervention" and "nonaggression".
2. The principle of self-defence, and
3. The concept of humanitarian intervention.

It is hoped that these three heads provide a more or less complete theoretical basis for the determination of the legal status of the use of force in the protection of nationals abroad. Ideally, these three heads should perhaps have been considered side by side with post-1945 state practice relating to the use of force by states in the protection of nationals abroad. However, post-1945 state practice is examined separately in the last chapter. This has been done largely to facilitate clearer presentation.

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ABBREVIATIONS

A.J.I.L.	American Journal of International Law
British Yb. Int. L.	The British Yearbook of International Law
Cmmnd.	United Kingdom Command Papers
C.T.S.	The Consolidated Treaty Series
Dept. State Bull.	[U.S.] Department of State Bulletin
E.T.S.	European Treaty Series
For. Rel.	[United States] Foreign Relations
G.A.O.R.	[United Nations] General Assembly Official Records
I.C.J.	International Court of Justice
I.C.J. Rep.	International Court of Justice Reports
Int. Law Comm.	International Law Commission
Int. L. Q.	International Law Quarterly
Int. L.M.	International Legal Materials
Iowa L.R.	Iowa Law Review
Israel Yb. H.R.	Israel Yearbook on Human Rights
L.N.O.J.	League of Nations Official Journal
L.N.T.S.	League of Nations Treaty Series
Michigan L.R.	Michigan Law Review
Moore, Digest	A Digest of International Law by John Bessett Moore
Parl. Deb. H. of C.	[United Kingdom] Parliamentary Debates (Hansard). House of Commons Official Report
Parl. Deb. H. of L.	[United Kingdom] Parliamentary Debates. House of Lords Official Records

P.C.I.J.	Permanent Court of International Justice
P.C.I.J. Rep.	Permanent Court of International Justice Reports
R.C.	Recueil des Courts de l'Academie de Droit International
R.I.A.A.	[United Nations] Reports of International Arbitral Awards
U.K.T.S.	United Kingdom Treaty Series
I.N.C.I.O.	United Nations Conference on International Organization
U.N. Doc.	United Nations Official Documents
U.N.T.S.	United Nations Treaty Series
U.N. Yearbook	Yearbook of the United Nations
U.S.T.I.A.S.	United States Treaties and Other International Agreement Series
U.S.T.S.	United States Treaty Series
Whiteman Digest	Digest of International Law by Marjorie Whiteman
Yale L.J.	Yale Law Journal

CHAPTER 1

THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD AND PRE-1945 INTERNATIONAL LAW - INTRODUCTORY

Early Classical Writers

The question whether a state can lawfully use force in order to protect its nationals within foreign territory does not as such appear to have received any legal attention in the period before the nineteenth century. Naturalist writers like Grotius and Vattel did not specifically deal with this question. Their discussions relating to the problem of the use of force by states or nations were dominated by the subject of war, when and when not a war would be just. In these discussions, however, the classical writers made some incidental references to a theme that was to have enduring significance in legal theory relative to the protection of nationals abroad. Grotius and, more importantly, Vattel, fostered the idea that the citizen (subject) was an extension of the state (ruler) to which he belonged, and therefore that an injury to the citizen or his interests constituted an injury to the state.[1] In the words of Vattel:

> If a nation is bound to preserve its existence, it is not less bound to preserve carefully the lives of its members. It owes this duty to itself; for the loss of any one of its members would weaken it and insofar attack its existence. It owes the same duty to its individual members by reason of the very fact of association by which they united for their natural defence and welfare.[2]

And, in an oft-quoted passage, he stated that:

> Whoever ill-treats a citizen indirectly injures the state, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him since otherwise the citizen will not obtain the chief end of society which is protection.[3]

Apparently, however, these writers had in mind citizens in general, irrespective of whether such citizens resided abroad or at home. It would also appear that they were not thinking specifically of injuries caused by foreigners but of injuries in general, whether caused by foreigners or by fellow citizens. Nevertheless, their identification of the interests of individual citizens with those of the state was an important step toward the recognition of the responsibility of a state to protect the interests of its nationals abroad. For as Hindmarsh notes:

> . . . as soon as the view was accepted that an unredressed injury to a subject constituted an offence against the state, direct state action became a logical consequence. Obligation on the part of the community to lend its power and influence to the support of its members' interest abroad was a logical deduction from the conception of communal solidarity.[4]

However, it was not until the nineteenth century that the subject of the use of force in the protection of nationals abroad began to receive specific legal attention.

Theory and Practice During the Nineteenth and Early Twentieth Centuries

In the theory and practice of customary international law during the nineteenth and early twentieth centuries, the right of a state to use force in the protection of its nationals abroad was generally admitted.[5]

In the theory of customary international law during the period under review, such use of force in the protection of nationals abroad was variously characterized as a form of "self-defence", "self-preservation", "self-protection", or as an aspect of the "right of intervention".[6] It was really a matter of indifference under which head this form of the use of force was said to fall. The "rights" of "self-defence", "self-preservation", "self-protection", and "intervention" were usually employed as identical or overlapping categories.[7] As long as a state resorted to force to protect its own legal rights, any of these doctrines operated to justify incidental violations of the sovereignty of another state. The interests or rights of citizens abroad were theoretically identified with those of the state of their nationality. The identification was based on the same natural law idea that the citizen constituted an extension of the state to which he belonged, and therefore that an injury to such a citizen constituted an injury to the state.[8] In one relevant aspect, however, the "right of intervention" contrasted with the categories of "self-defence", "self-preservation", and "self-protection". These latter categories were confined to matters that fell well within the rubric of self-help in that they operated to justify state conduct that was directed at the protection or vindication of a state's own interests and the interests of its citizens. The "right of intervention" was, on the other hand, broader; it was invoked by states to justify the use of force in the protection of foreign nationals as well.[9] The absence of any

bond of nationality between the protected foreign nationals and the states resorting to force necessarily posed some theoretical problems, and, as shall be seen later, some jurists were inclined to reject the legality of intervention on behalf of foreign nationals on this very score.[10]

The doctrines of "self-defence", "self-preservation", "self-protection", and "intervention" were vague and elastic.[11] Writers and statesmen failed to clearly define the legal content and scope of these doctrines.[12] The doctrines were so asserted as to constitute the basis for the justification of the forcible protection of "rights" and "interests" of various descriptions including "national honor", "abatement of nuisance", "commerce" and a plethora of undefined "vital interests".[13] In the transactions between the United States and the United Kingdom relating to the Caroline and McLeod cases,[14] a great deal was said in the attempt to spell out the formal conditions governing the operation of the doctrine of "self-defence" or "self-preservation".[15] The principles enumerated in the course of these transactions were, however, hardly reflected in actual state practice.[16] In particular, the conditions enumerated in the course of these transactions do not appear to have, in any significant way, influenced the definition of the customary law right of armed protection of nationals abroad.

State practice during this period leaves no doubt that states recognized "protection of nationals" as a sufficient justification for one state to use force against, or within,

another state. It was indeed very common for powerful states to land troops on foreign territory for the purpose of "protecting nationals". Milton Offutt, for example, has recorded more than 76 instances when the United States, either alone or in conjunction with other powers, had used force on foreign territory for the purpose of protecting the lives or property of American citizens during the period between 1813 and 1927.[17] In some of these instances there was express consent or even request on the part of the local authorities that foreign troops be landed for the purpose of protecting the lives and property of foreigners because the local authorities could not themselves afford such protection.[18] There is no doubt, however, that in these cases the United States would not have felt any less entitled to resort to force even had there been no authorization by the local authorities. Thus, in a letter to the United States' Minister at Havana, Cuba, the United States' Secretary of State, Knox, warned that:

> This government [the United States Government] does not undertake first to consult the Cuban Government if a crisis arises requiring a temporary landing somewhere to protect life and property on the broad principles of international practice. You will clearly explain this verbally to Preseident Gomez [of Cuba].[19]

Indeed, no authority had been sought from Cuba during the 1895-98 Cuban revolution, when United States troops were sent to Cuba to "afford them [U.S. citizens] that protection and indemity for life and property which no government can or will afford."[20]

Other powerful states like Britain, Germany, Russia, Spain, Austria, Italy, and Japan had also at one time or another during the same period, either individually or jointly used force to secure the protection of their "nationals" abroad. It will be apparent from some of the examples that follow that by "protection of nationals" states did not include merely measures of force to protect nationals in specific circumstances of danger, but also measures of force to press financial claims on behalf of nationals against foreign governments. Thus, in 1862, France, Great Britain, and Spain jointly employed force against Mexico.[21] In a Convention Relative to Combined Operations against Mexico signed earlier on October 31, 1861,[22] the intervening powers had agreed:

> . . . to concert the measures necessary for seizing and occupying the various fortresses and military positions on the Mexican litoral, in order to give more efficacious protection to the persons and property of their subjects, as well as to secure the execution of the obligations contracted toward them by the Mexican republic.[23]

The intervening powers had commendably also agreed that they would not, in the employment of measures of coercion, make any acquisition of territory, or take any particular advantage, or exercise in the domestic affairs of Mexico any influence incompatible with its political independence.[24] In fact, Britain and Spain later abandoned the measures against Mexico when it became clear that France would not abide by this latter undertaking.[25]

So too, on December 11, 1902, Great Britain, Germany and Italy blockaded some ports of Venezuela in order to secure

recognition and the means of payment of financial claims due from Venezuela to the nationals of the blockading powers.[26] Anticipating hostile reaction from the United States, the German Government had clarified its policy as follows:

> But we consider it of importance to let first of all the Government of the United States know about our purposes so that we can prove that we have nothing else in view than to help those of our citizens who have suffered damages. . . .
>
> We declare especially that under no circumstances do we consider in our proceedings the acquisition or permanent occupation of Venezuelan territory.[27]

The declaration by the German Government that it had no intention of acquiring or permanently occupying Venezuelan territory was typical of the statements by many other governments that resorted to coercive protection of their nationals abroad. Such declarations, by strongly suggesting that states did not view with favour the acquisition of territory by means of force, indirectly made more certain the fact that states unquestionably viewed the protection of nationals as a sufficient justification for one state to use force against or within another state. The United States Secretary of State, Hay, sympathetically noted the purpose of the blockade:

> . . . the German Government informs that of the United States that it has certain just claims for money and damages wrongfully withheld from German subjects by the Government of Venezuela, and that it proposes to take certain coercive measures . . . to enforce the payment of these just claims.[28]

The blockade of Venezuela may also be said to have received indirect blessing from the Permanent Court of Arbitration at

the Hague where the dispute between Venezuela and the blockading powers was finally resolved. The Court upheld the claim by the blockading powers to preferential treatment in Venezuela's undertaking to liquidate foreign debts (including debts due to neutral powers) from a designated fund.[29] These special rights of the blockading powers came as a direct result of the military measures taken against Venezuela.[30] By upholding the claims of the blockading powers to preferential treatment, the Court may be said to have indirectly recognized the legitimacy of the blockade. For had the Court not assumed that the blockade was legitimate, it would likely, as a matter of policy, have rejected the claims of the blockading powers; or at any rate, it would have made some adverse comments on the blockade. On the contrary, the Court noted that since 1901, Venezuela had categorically refused to settle its disputes with two of the blockading powers by resource to arbitration.[31]

Financial claims on behalf of nationals abroad were also a subject of forcible measures by Great Britain against Greece in 1850.[32] Some members of the British Parliament, while recognizing the duty of the Government to secure for its subjects residing abroad the full protection of the laws of the foreign states, were uncertain as to whether the resort to coercion was justified in that particular case.[33] On behalf of the Government, it was, however, contended by Lord Palmerston that:

> 'The Greek Government, having neglected to give protection they were bound to extend, and having abstained from

> taking means to afford redress, this was a case in which we were justified in calling (by means of force) on the Greek Government for compensation for the losses, whatever they might be, which M. Pacifico had suffered.[34]

One of the most celebrated instances of forcible protection of nationals abroad during this period was the so-called "Boxer Expedition" which occurred between 1900 and 1901 in China.[35] Unlike most cases of protection of nationals during this period, the Boxer Mission did not take on a purely punitive or enforcement character; the mission was, at least in its principal aim, a case of actual protection of nationals against specific physical danger. Increasing resentment on the part of the Chinese people against foreigners and foreign influence erupted into open violence in 1900. Members of a "secret" Chinese society, the "Righteous Harmony Fists", or the "Boxers" embarked on a series of activities, including killings, aimed at the harassment of foreigners, in particular, members of the diplomatic staff and missionaries. Far from protecting the victims of these activities, the Chinese Imperial troops in fact appear to have actively supported the "Boxers". Consequently, an international expedition, composed of troops from the United States, Great Britain, Russia, Austria, Germany, Japan, and Italy was dispatched to China. Although the countries involved in the mission did not conceal the fact that they had other collateral, though in their view equally justified, motives in China, the records leave little doubt that protection of nationals was the main objective of the mission. Thus, in a speech made in the French

Chamber of Deputies on July 3, 1900, M. Delcasse, French Minister of Foreign Affairs, declared that France did not desire to "break up China" and had "no wish for war with China", but that she could not "evade the duty of protecting her citizens and of obtaining for her merchants the guarantees obtained by others."[36] On the same day, the United States Secretary of State sent a circular telegram to diplomatic representatives of his country at the capitals of all other states involved in the expedition, stressing that the United States would be using force in China for the purpose of

> . . . rescuing the American officials, missionaries, and other Americans who are in danger; (and) affording all possible protection everywhere in China to American life and property. . . .[37]

On behalf of the British Government, Lord Salisbury "expressed himself most emphatically as concurring in the . . . . policy of the United States" as set out in the circular of July 3.[38] And the Russian Government also assured the other powers that:

> Russia had no designs of territorial acquisition in China; that equally with other powers now operating there, Russia has sought safety of legation at Peking and to help the Chinese Givernment repress the troubles.[39]

Typical of the cases of protection of nationals during this period, however, the actual execution of the Boxer mission did not take the form of evacuation, but consisted of numerous expeditions through several areas of China with the object of "pacification"[40] of these areas. The process of "pacification" also involved the occupation of some key Chinese cities, including Peking. It was not until September, 1901, that the

intervening powers signed a Final Protocol[41] with China, ending the occupation. In fact, under Article 7 of the Protocol, a considerable portion of the allied legation guards were to remain in China for some time thereafter. Outside the Latin-American countries, China was perhaps more often subjected to the forcible protection of foreign nationals by foreign powers than any other country. In the three decades following the "Boxer Expedition", the "right of protection of nationals abroad" was frequently invoked by countries like the United States, Great Britain, France and Japan to justify military intervention in China.[42] The most notorious utilization of this "right" was Japan's claim during the Sino-Japanese crisis of 1931-32.[43] Japan asserted that its occupation of Manchuria and later Shanghai was necessitated by the need to protect Japanese lives and property in these cities.[44] The discussions of the subject within the League of Nations do, in a way, reveal that members, including China, in principle, recognized the justification of protection of nationals. Thus, in its resolution of 30 September, 1931, the League Council noted:

> . . . the Japanese representive's statement that his Government will continue, as rapidly as possible, the withdrawal of its troops, which has already begun, into the railway zone in proportion as the safety of the lives and property of Japanese nationals is effectively assured. . . .

and

> . . . the Chinese representative's statement that his Government will assume responsibility for the safety of the lives and property of Japanese nationals outside that

> zone as the withdrawal of the Japanese troops continues and the Chinese local authorities and police forces are re-established.[45]

Eventually, however, it became clear that Japan was using "protection of nationals" merely as a pretext for her expansionist policies in China. The Lytton Commission whose report was unanimously adopted by the League of Nations Assembly found little basis for the Japanese claim that the lives and property of Japanese nationals were endangered by the Chinese. The Commission consequently concluded that the military operations of Japan could not be regarded as measures of legitimate self-defence.[46]

The crisis of the Sudeten Germans[47] should perhaps properly be regarded as an example of the abusive use of the doctrine of "humanitarian intervention" and not as an abuse of the "right" of protection of nationals abroad. Hitler invoked the "suffering" of the Sudeten Germans to justify Germany's invasion of Czechoslovakia.[48] The Sudeten Germans in question were technically citizens of Czechoslovakia and not Germany. Indeed, initially, Germany was demanding some form of self-rule for the Sudeten Germans. This demand would clearly be inconsistent with the claim that the Sudeten Germans were part and parcel of the State of Germany.

Although in the practice of states during the nineteenth and early twentieth centuries the right to use force in the protection of nationals abroad was thus generally admitted, the nature and scope of this right was by no means clearly defined. States did not confine the justification of "protection of

nationals" to the protection of nationals caught in specific circumstances of danger within foreign territory. For example, the majority of the instances of recourse to force justified by the United States Government on the basis of protection of nationals, tended to be mere incidents forming part of more comprehensive routine campaigns by the United States Navy against an indeterminate variety of criminal acts of foreign inhabitants affecting United States citizens, in particular merchants.[49] These operations took the form of general police action: they were either punitive expeditions against identifiable offenders, for example, the bombardment of Greytown in 1854,[50] or preventive actions involving the pursuit and destruction of potential marauders. As has already been noted, some cases of "protection of nationals" consisted of punitive or enforcement measures against foreign governments that had failed to discharge their obligations, in particular pecuniary obligations, with respect to foreign nationals. And, as may be evident from the "Boxer Expedition", even in cases where states purported to protect nationals against specified danger in a foreign country, the measures of protection often went beyond the immediate protection of nationals. States purporting to protect their nationals rarely did so by merely evacuating such nationals to safety. Measures of protection tended to take the form of prolonged occupation of foreign territory, or the coercion of local authorities into accepting certain long term arrangements for the ostensible benefit of foreign nationals. Inevitably, measures of protection tended

always to undermine the political authority of the local rulers. On the whole, it is perhaps accurate to say that customary international law during this period failed to delineate the scope of the right to use force in the protection of nationals abroad.

This absence of any clear limitations on the right to use force in the protection of nationals abroad was, to a large extent, a reflection of the inherently weak character of customary international law relative to the use of force by states. The law generally failed to establish any clear distinction between the legal and the illegal use of force by states. Customary international law did not include among its principles any general obligation upon states to refrain from the use of force against each other.[51] On the contrary, force was generally recognized as a legitimate means of settling international disputes, enforcing international obligations, and punishing international delicts.[52] In fact, throughout the second half of the nineteenth century, the predominant legal theory was that war, the most extreme form of coercion, could be characterized neither as legal nor illegal.[53] The attempts to draw a distinction between the "just" and the "unjust" war which characterized earlier works like those of Grotius,[54] were conspicuously absent in many of the legal commentaries of the second half of the nineteenth century. The notion of absolute state sovereignty gained ascendancy in the political and legal thought of the period. Resort to war in the view of most jurists and statesmen was an attribute or prerogative of

sovereignty, the legitimacy of which no one other than the states involved in it had the competence to judge.[55] In the predominantly positivist legal thinking of the nineteenth century, it was readily accepted that in the absence of any fully developed international organization with competent authority to judge on the rights and duties of states, on the violations of such rights and duties, and with power to carry out sanctions against such violations, no useful or practicable legal distinction would be possible between the just or lawful and unjust or unlawful resort to war.[56] True, in the decentralized international community, war sometimes served as a "legitimate" means of self-help to enforce international rights and obligations, and hence to promote the observance of international law. Yet, without any difference as to the consequences between war resorted to as an instrument of law and war resorted to for other reasons, it was as well not to attempt to characterize war as a judicial mechanism for settling international disputes or as a sanction.

With the admission of the inability of the law to regulate the resort to war by states, the attempts to evolve legal doctrine regulating the resort to less extreme measures of force, like measures of force to protect nationals abroad, were incongruous and largely superficial.[57] The very reasons for which jurists rejected the "just war" doctrine were equally valid for rejecting the attempts to place substantive limitations upon the resort to other measures of force. Since each state held itself almost entirely free to decide and act

for itself in the determination of the merits of its case, the numerous "rights" which formed the theoretical basis for the justification of various forms of coercion did not constitute any real standards by which a state's resort to force would be adjudged either as legal or illegal. Instead of functioning as standards by which the legal use of force would be distinguished from the illegal use of force, and hence, as guides in the practice of states, "rights", like those of "self-defence", "self-preservation", and "intervention", only too easily served as instruments of power politics. States could at will stretch the scope and application of these "rights".[58] Consequently, it was not possible for "legal" justifications, for example the justification of protection of nationals, to have any precise legal content or to be subjected to any clear legal limitations.

Limitations Under Conventional International Law

In general, pre-1945 developments in conventional international law relative to the use of force by states left unaffected the broad and also vague customary law "right" of protection of nationals abroad by the use of armed force. The extent to which the principle of "nonintervention" embodied in the multilateral conventions of the American states curtailed the scope of the customary law "right" of protection of nationals abroad is a matter that has given rise to a considerable amount of controversy. This matter will, however, be given full consideration as part of the general examination of post-1945 legal principles affecting the use of force in the protection

of nationals abroad. For indeed, although most of the inter-American conventions on nonintervention[59] came into existence in the period before 1945, it was only after the Second World War that their impact really began to be felt. It is in fact after the War that the establishment of a general principle of nonintervention began to attract more universal concern.

This is perhaps the point at which it can be noted that some of the states against whom the "right" of coercive protection of nationals abroad was invoked, strenuously protested against certain extensions of this "right". This was particularly so among Latin-American states who sometimes went to the extremity of denying altogether any right on the part of a state to protect its citizens abroad.[60] The joint blockade of Venezuela by Great Britain, Germany, and Italy,[61] for example, gave rise to much discussion concerning the propriety of the use of force for the purpose of securing the settlement of pecuniary claims against foreign states. Most notably, the blockade provoked the Argentine Minister of Foreign Affairs, Dr. Drago, to send a note of protest to the Argentine Minister in Washington for transmission to the United States Government. In the note, Dr. Drago declared, among other things, that

> . . . the public debt cannot occasion the armed intervention nor even the actual occupation of the territory of an American nation by a European power.[62]

It is, however, worth noting that Dr. Drago did not take the extreme view of denying altogether the right of a state to protect its nationals abroad. And significantly, Dr. Drago

expressly stated that in his enunciations, it was not pretended that European powers had not the right to protect their subjects as fully as elsewhere against "the persecutions and injustices" of which they might be victims.[63] The view against the use of force for the purpose of securing the settlement of pecuniary claims against foreign states was, however, to be pressed further at the Second Hague Peace Conference, 1907, where an attempt was made, especially by Latin-American states, to establish an absolute principle against such employment of force.[64]

The Second Hague Peace Conference, 1907, did not, however, achieve much with respect to the limitation of the customary law "right" of coercive protection of nationals abroad. The Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, also known as the Porter Convention,[65] was of very limited scope. It confined the principle against the employment of force to the specified cases of recovering "contract debts claimed from the Government of one country as being due to its nationals."[66] Moreover, the obligation did not apply in the case where the debtor state refused or neglected to reply to an offer of arbitration, or after accepting the offer, prevented any compromis from being agreed on; or after the arbitration, failed to submit to the award.[67] By this proviso, the Convention in fact implicitly recognized certain circumstances in which the resort to coercive measures as a means of pressing international claims would be lawful.[68]

The Porter Convention does not appear to have had much influence upon international law. Viewed solely in the context of the protection of nationals abroad by means of force, the Convention stood out as an isolated effort. Nothing further was done to confirm, to revise, or to develop it. Appraised in the broader context as part and parcel of the Hague Peace plan, the Convention was soon virtually superseded by the League of Nations Covenant[69] and the Pact of Paris, also known as the Kellogg-Briand Pact.[70] Neither the League Covenant nor the Pact of Paris contained any provision specifically dealing with the use of force in the protection of nationals abroad. The provisions of these instruments were of general character relating to the limitation of the "right of war" and the promotion of pacific means of settling international disputes.[71] There was also no reference in these instruments to the "rights" of "self-defence", "self-preservation", or "intervention" with which the right of protection of nationals abroad was customarily associated.

True, the reservations of the right of self-defence was generally understood to constitute a condition precedent for accepting the Pact of Paris:[72] Thus, in response to the French reservation "that each country should retain the right of legitimate defence", the United States Secretary of State, Kellogg, in his explanation of the American draft of the treaty, stated inter alia, that:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign

> state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence.[73]

Unfortunately, however, the legal content of the reserved right of self-defence remained undefined. The right of self-defence was necessarily to be defined with reference to the customary international law under which it was inextricably associated with the other vague "rights" of "self-preservation", "self-protection", and "intervention". That states held rather vague and even controversial ideas about the reserved right of self-defence was, for example, illustrated by the British reservation under which it was declared that:

> There are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for, our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be made clear that His Majesty's Government in Great Britain accepts the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.[74]

The British Government drew a parallel between this geographic definition of self-defence and the Monroe Doctrine. The British reservation was, however, much less definite and did not apply to a clearly delimited geographical area.[75] The reservation largely reflected the philosophy of the time regarding the right of self-defence, namely, that each state was competent individually to decide as to the proper exercise and scope of the right.[76]

The reservations to the Pact of Paris merely confirmed the

continued existence of the customary law right of self-defence. And, to the extent that the use of force in the protection of nationals abroad also amounted to self-defence, the reservations also confirmed the continued existence of the customary law right of protection of nationals abroad. The reservations shed no new light on the problem of defining the right of self-defence, and particularly, on the problem of defining the right of protection of nationals abroad by the use of force.

Thus, the use of force in the protection of nationals abroad during the period under review was - even with regard to states that were parties to the Porter Convention, the League Covenant, and the Pact of Paris - almost completely governed by customary international law. The inadequacy of this law as a means of regulating the use of force by states, and the reflection of this weakness of the law in the vagueness of the right of protection of nationals abroad by means of force, have already been commented upon.[77]

NOTES: CHAPTER 1

[1]Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, Bk. II, cap. XXV, S.I., p. 578 (Carnegie tr. 1964); Emer De Vattel, Le Droit des Gens, Ou Principes de la Loi Naturelle, Bk. I, cap. II, s. 17, p. 14 and also cap. VI, s. 71, p. 136. (Carnegie tr., 1916).

[2]Op. cit., cap. II, s. 17, p. 14.

[3]Op. cit., cap. VI, s. 71, p. 136.

[4]Albert Hindmarsh, Force in Peace (1933), pp. 52-3.

[5]See nn. 6 and 7 of this chapt.

[6]Thus, under paragraph 1647 of the Regulation for the Government of the Navy of the United States, it was stated that "the right of self-preservation . . . includes the protection of the state, its honor and its possessions and the lives and property of its citizens" [quoted by Hindmarsh, op. cit., p. 76 n. I]. Hall stated that "the right to protect citizens abroad falls under the head of self-preservation" [W.E. Hall, A Treatise on International Law (1924) pp. 298, 331, 8th ed. by Pearce Higgins]. Wheaton, [Elements of International Law (1836), p. 299], held a similar view. Westlake considered the subject of protection of nationals under the head of self-defence [John Westlake, I, International Law (1904), p. 299]. According to Oppenheim, the protection of nationals abroad was a form of "intervention by right" [L. Oppenheim, International Law (1912), p. 192 2nd ed.].

[7]For example, Wheaton discussed the "rights" of "intervention" and "self-defence" under the head of "self-preservation" [op. cit., p. 42]. Hall too treated self-preservation as a broad right subsuming the "right of self-defence" [op. cit., p. 342]; Oppenheim [op. cit., p. 185] and Westlake [op. cit., p. 296], equated "self-defence" with "self-preservation".

[8]See supra. n.I. Thus Borchard could write:

> "National welfare and individual welfare are indeed intimately bound together. In an impairment of individual rights the state, the social solidarity is

affected".
[Edwin Borchard, The Diplomatic Protection of Citizens Abroad (1915), p. 31].

[9]This will be considered in detail under the head of "humanitarian intervention". See Chapt. 4 below.

[10]See n. 9 above.

[11]For further commentary on these doctrines, see Ian Brownlie, International Law and the Use of Force by States (1963), pp. 40-49; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States", 81 R.C. (II, 1952), p. 455, at p. 462 and also Brierly's The Law of Nations (1963), p. 404; D.W. Bowett, Self-Defence in International Law (1958), p. 10; George Schwarzenberger, "Fundamental Principles of International Law," 87 R.C. (I, 1955), p. 195 at pp. 343-44; R.Y. Jennings, "The Caroline and McLeod Cases", 32 A.J.I.L. (1938), p. 82.

[12]See for example, the discussions of these doctrines by Wheaton, op. cit., p. 11; Phillimore, I, International Law (1879), p. 312; Hall, op. cit., p. 298; and Westlake, op. cit., p. 299.

[13]See Fritz Grob, The Relativity of War and Peace (1969) generally; Moore, 2 Digest, ss. 214-24, pp. 400-46; Hindmarsh, op. cit., generally; Brownlie, op. cit., pp. 40-50; Milton Offutt, The Protection of Citizens Abroad by the Armed Forces of the United States (1928) generally.

[14]See Moore, 2 Digest, s. 217, p. 409; R.Y. Jennings, op. cit., p. 82.

[15]Of particular relevance was a letter of 6 August, 1942 by the U.S. Secretary of State, Webster, to the British Representative in the U.S., Mr. Fox. In this letter, Webster demanded (as minimum justification for the British action in destroying the ship, Caroline, within the U.S. territorial waters) the British Government to show:

> A necessity of self-defence, instant and overwhelming leaving no choice of means, and no moment for deliberation. It will be for it to show also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.

[See British and Foreign State Papers, vol. 30, p. 193; Moore,

op. cit., p. 412]. Although only "self-defence" appears in this passage, "self-preservation" also appeared in other passages and other parts of the correspondence. No attempt was ever made to differentiate between "self-defence" and "self-preservation".

[16]Indeed, it is interesting to compare Webster's strictures with the U.S. own practice during the same period involving the pursuit of privateers in Mexico and other South American countries. See Moore, 2 Digest, s. 215, p. 402; s. 216, p. 406; s. 218, p. 414; s. 219, p. 418. These expeditions against privateers were often justified "upon the immutable principles of self-defence" [see Moore, op. cit., p. 420]. Yet, Webster's conditions were no nowhere in evidence.

[17]The Protection of Citizens Abroad by the Armed Forces of the United States (1928), generally. See also Thomas and Thomas, Nonintervention (1956), pp. 15-54.

[18]See for example, the U.S. intervention in Uruguay 1855 [Offutt, op. cit., p. 36], Mexico, 1876 [Offutt, op. cit., p. 65], Cuba 1906 [Offutt, op. cit., p. 102], and even in Nicaragua, 1926, [Offutt, op. cit., p. 137, see also Thomas and Thomas, op. cit., pp. 39-45]. Such cases usually arose during civil disturbances and, perhaps, the local authorities were sometimes only too grateful to have foreign troops on their soil in the hope that such troops might tilt the military balance in their favour.

[19][U.S.] Foreign Relations, 1912, p. 250.

[20]See Hyde, I International Law (1922), s. 81 pp. 127-28.

[21]See Moore, 2 International Arbitrations, p. 1289.

[22]124 C.T.S. (1861), p. 448; also British and Foreign State Papers, Vol. L1, p. 61.

[23]Art. I.

[24]Art. 3.

[25]See British and Foreign State Papers, Vol. LIII, pp. 530, 573, Vol LIV, pp. 538, 539, 542, 944; Moore, 2 International Arbitrations, p. 1291.

[26]Moore, 6 Digest, s. 967, p. 586; J.B. Scott, The Hague Court Reports (1916), p. 55.

[27]Memo from the German Embassy in Washington, Dec. 11, 1901, [U.S.] Foreign Relations, 1901, p. 192; Moore, 6 Digest, p. 589.

[28]Memo by Sec. of State Hay, to the German Embassy, Dec. 16, 1901, [U.S.] Foreign Relations, 1901, p. 195; Moore, 6 Digest, p. 590.

[29]The Venezuela Preferential Case, 1904. See J.B. Scott, The Hague Court Report (1916), p. 56.

[30]The claims to preferential treatment were embodied in the Protocols of Agreement entered into between Venezuela and each of the blockading powers [see 192 C.T.S. (1902-1903) pp. 411, 413, 418]; and it is these Protocols which marked the end of the blockade. Many other states which also had claims against Venezuela signed the Protocols as adherents.

[31]J.B. Scott, op. cit., p. 59. See C.I.J. Judgement, see Chapt. 5, n. 104.

[32]These were claims in relation to the celebrated case of Don Pacifico. See Moore, 6 Digest, p. 852; 7 Digest, p. 132.

[33]Parl. Deb. (3rd Series) Vol. CXI, p. 1332.

[34]Parl. Deb. (3rd Series) Vol. CXII, pp. 394-96.

[35]See Moore, 5 Digest, s. 808, p. 476; Fritz Grob, op. cit., p. 64; Offutt, op. cit., p. 85; Brownlie, op. cit., p. 29.

[36]Moore, 5 Digest, pp. 482-83.

[37][U.S.] Foreign Relations, 1900, p. 299; Moore, 5 Digest, pp. 481-82.

[38]Moore, 5 Digest, p. 483.

[39][U.S.] Foreign Relations, 1900, p. 304; Moore, 5 Digest, p. 484.

[40]The actual process of "pacification" was not entirely impressive. In particular, the early phases of the mission were characterized by much barbarism on the part of both the allied troops and the Chinese people. Plunder, looting, and excesses of various descriptions were widespread. The Chinese people were much repressed by the allied forces. See Grob, op. cit.,

pp. 67-69.

[41]Final Protocol for the Resumption of Friendly Relations signed at Peking, 7 Sept. 1901. See 190 C.T.S. (1901-1902), p. 61. Even this Protocol shows that the main concern of the allied powers was the protection of their nationals. The Protocol did impose rather harsh terms on China. These terms were nevertheless clearly focused on the problem of foreign nationals in China: heavy fines imposed on China as compensation for foreign lives and property lost during the rebellion; other demands aimed at the appeasement of the allied powers; undertakings by China to take certain steps aimed at safeguarding foreign interests in particular foreign lives in China.

[42]See Offutt, op. cit., pp. 140-49; Brownlie, op. cit., pp. 293-96; 9 British Yb. Int. Law (1928), pp. 228-229; "The League of Nations Assembly Report on the Sino-Japanese Dispute" 27 A.J.I.L. (1933), p. 119; See also "The Settlement of the Nanking Incident" 22 A.J.I.L. (1928), p. 393.

[43]See "League of Nations Report on the Sino-Japanese Dispute", 27 A.J.I.L. (1933), p. 119; The Report of the Commission of Enquiry Into the Sino-Japanese Dispute, League Doc. 1932, vii, 12; A summary of the report appears in International Conciliation, 1933, p. 58.

[44]See L.N.O.J. 1931, pp. 2267, 2289-90, 2343, 2376, 2455, 2514, 2529, 2531, see also citations in n. 43 above.

[45]L.N.O.J. 1931, p. 2307. See also Council Resolution of 24 Oct. 1931, ibid., pp. 2340-41, 2358, and of 10 Dec. 1931, ibid., pp. 2374 seq. also 27 A.J.I.L. (1933), pp. 123-131.

[46]League Doc. 1932, vii, 12, p. 71; International Conciliation, 1933, p. 58 at pp. 67-8.

[47]See International Conciliation, 1938, p. 401.

[48]See Hitler's Speech, International Conciliation, 1938, p. 411 seq.

[49]See Offutt, op. cit., generally; Moore, 2 Digest, 2. 215, p. 402; s. 216, p. 406; s. 218, p. 414; s. 219, p. 418.

[50]Moore, 2 Digest, s. 218, p. 414.

[51]See McDougal and Feliciano, Law and Minimum Public Order

(1961), p. 135.

[52]See Hindmarsh, op. cit., generally.

[53]See for example, Hall, op. cit., p. 82; Westlake, op. cit., vol. II, p. 4. See also comments by J.L. Brierly, The Basis of Obligation in International Law (1958), p. 230; Waldock, 81 R.C. (II, 1952) p. 469; Q. Wright, "Changes in the Concept of War", 18 A.J.I.L. (1924), p. 755; Georg Schwarzenberger, 2 International Law (1967), pp. 38-39; Hindmarsh, op. cit.; generally; and McDougal and Feliciano. op. cit., p. 137.

[54]Hugo Grotius, op. cit., Bk. II, cap. I, p. I seq., cap. 20, p. 170 seq., see also Vattel, op. cit., Bk. III, cap. III, p. 243 seq.; Samuel Pufendorf, De Jure Naturae et Gentium Libri Octo, Bk. V, cap. VI, p. 1292 (Carnegie tr., 1964); Pierino Belli, De Re Militari et Bello Tracatus, Vol. II, Part II, p. 59 (Carnegie tr. 1936); Francisco Suarez, A Work on the Three Theological Virtues, Faith, Hope, and Charity, from Selection from Three Works, vol. II, p. 641 (Carnegie tr. 1944); Wolf, Jus Gentium Methodo Scientifica Pertractatum, Vol. II, cap. VI, p. 311 (Carnegie tr. 1964); Alberico Gentili, De Jure Belli Libri Tres, Bk. I, generally; Balthazar Ayala, De Jure et Officiis Bellicis et Disciplina Militari Libri Tres, Part II, cap. II, p. 7 (Carnegie tr. 1912),; and the views of Francisco De Victoria appear in J.B. Scott's The Spanish Origin of International Law, Part I, cap. 14, p. 195 (1934).

[55]See McDougal and Feliciano, op. cit., p. 135. The reservations to the Kellogg-Briand Pact to a great extent reflected this view of states as to the freedom to resort to force. See infra, nn. 72-6.

[56]See e.g. Westlake, n. 53 above; also Hall, op. cit., p. 82.

[57]See Schwarzenberger, International Law Vol. II, (1967), p. 39.

[58]Naturally, these "rights", at least in the form they were asserted during the nineteenth and early twentieth centuries, could not escape judicial criticism. The "rights" of "self-preservation", "self-protection" etc. were inextricably associated with the idea of "inalienable, indestructible, unprescriptible, uncurtailable rights of nations". This idea of natural rights was, for example, severely castigated by the General Claims Commission in the North American Dredging Co. v. United Mexican States Case (1926)

4 R.I.A.A., p. 26 at pp. 29-30. The Commission observed that these so-called "natural rights" had failed as a durable foundation of international law, and that "instead of bringing to the world the benefit of mutual understanding, they (were) to weak or less fortunate nations an unrestrained menace". And in 1949, the International Court of Justice found occasion to dismiss the "right of intervention".

> As the manifestation of a policy of force, such as has in the past, given rise to most serious abuses and such as cannot, whatever the present defects in international organization, find a place in international law".

Corfu Channel Case (Merits) J.C.J. Rep. 1949 pp. 34-35. See also the dissenting opinion of the Soviet Judge, Krylov, at p. 75.

[59]See Chapt. 2 below, text to nn. 33-38.

[60]See R. Lillich, "Diplomatic Protection of Nationals Abroad: Elementary Principle of International Law", 69 A.J.I.L. (1975), p. 359. See also North American Dredging Co. v. United Mexican States Case supra, n. 58.

[61]See text to n. 26 above.

[62]Note of Dec. 29, 1902 [U.S.] Foreign Relations, 1903, pp. 1-5; Moore, 6 Digest, s. 967, pp. 592-93. In this note, Dr. Drago constantly invoked the Monroe Doctrine, perhaps in an obvious effort to persuade the U.S. officials to his viewpoint. In this effort, Dr. Drago did not completely succeed as must be obvious from Secretary Hay's note of Feb. 17, 1903 in which he reiterated the view that by the Monroe doctrine, the U.S. did not guarantee any state against "punishment" if it misconducted itself. See [U.S.] Foreign Relations, 1903, p. 5; Moore, 6 Digest, p. 594. This view of the U.S. Government was to be reflected in the terms of the Porter Convention, 1907, see n. 65 of this chapt.

[63]Ibid.

[64]See The Proceedings of the Hague Peace Conferences Vol, II, (translation of the official texts by the Carnegie Endowment for International Peace), pp. 137-43; also J.B. Scott, Reports to the Hague Conferences of 1899 and 1907 (1917), pp. 491-99; The Hague Peace Conferences 1899 1907 Vol. I (1909), p. 386 seq.

[65]205 C.T.S. (1907), p. 251. Also 2 A.J.I.L. (1907) suppl. p. 81. 34 countries signed the Convention at the Hague. Of these only about 8 had ratified the Convention by 24 Nov. 1909.

These included the United States, Russia, Great Britain, and Austria-Hungary. See 3 Recueil Des Traites Par Martens, p. 416.

[66]Art. 1(1). The Preamble was equally narrowly framed.

[67]Art. 1(2).

[68]Indeed, it was the realization that Article 1(2) indirectly emphasized the admissibility of coercive means of pressing international claims that accounted for much of the negative reaction by Latin-American countries to the Convention. See The Proceedings of the Hague Peace Conference, pp. 137-42; Scott, Report of the Hague Peace Conference, pp. 903-904.

[69]The Covenant of the League of Nations formed the first part of the Treaty of Versailles, June 28, 1919. For the text of the Covenant, see 225 C.T.S. (1919), p. 195.

[70]See 94 L.N.J.S., p. 57.

[71]See Arts. 10-17 of the League Covenant, and the Pact of Paris generally.

[72]See H. Wehberg, The Outlawry of War (1931), p. 65. L.C. Green, "Armed Conflict, War, and Self-Defence". BD 6. Archiv. Des Volkerechts (1956-57), p. 386, at pp. 410-12; Brownlie, op. cit., p. 235; Bowett, op. cit., p. 135.

[73]Address before the American Society of International Law, Apr. 28, 1928, Proceedings of the American Society of International Law (1928), p. 141, at p. 143.

[74]See Green, op. cit., p. 411; Wehberg, op. cit., p. 86.

[75]It largely remained a matter of speculation that these "regions" referred to Egypt which latter country in fact expressly rejected all reservations made in connection with the Pact of Paris when it later adhered to it. See Green, op. cit., p. 411; also Wehberg, op. cit., p. 86.

[76]See for example, Kellog's Statement, n. 73 above. And also the Report of the Senate's Committee on Foreign Relations in which it was reiterated that:

> Each nation is free at all times and regardless of treaty provision to defend itself and is the sole judge of what

constitutes the right of self-defence and extent of the same. [See discussion by Green, op. cit., pp. 411-12].

[77]See supra, nn. 51-8.

CHAPTER 2

THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD: THE POSSIBLE BASES OF ILLEGALITY UNDER THE POST-1945 THEORY OF INTERNATIONAL LAW

Even under post-1945 practice of states, there is no international legal instrument which specifically makes provision for the subject of the use of force in the protection of nationals abroad.[1] Accordingly, the legal status of this form of use of force under present international law has necessarily to be determined by reference to the general principles of international law which define the freedom of states to resort to force. In this chapter, an attempt is made to relate the use of force in the protection of nationals abroad to the general norm against the use of force by states under post-1945 international law. In particular, the use of force in the protection of nationals abroad is examined in its relation to Article 2(4) of the United Nations Charter which contains the primary principle against the use of force by members of the United Nations, the general concept of "nonintervention", and the concept of "nonaggression". It is chiefly in these principles that the theoretical bases for the illegality of the use of force in the protection of nationals abroad may be sought.

Article 2(4) of the United Nations Charter

There is perhaps little doubt that with the introduction

of Article 2(4) of the United Nations Charter as read with Article 2(3), the broad customary law "right" of member states to resort to force in the protection of the interests of their nationals abroad has greatly been affected. Under Article 2(4) members of the United Nations have agreed to

> . . . refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations.

It has already been observed that under post-1945 practice of states, the protection of nationals abroad took various forms including prolonged occupations of foreign territory. Often, these measures of coercion had the effect of impairing the independence or sovereign character of many small and weak states.[2] Such measures would clearly fall under the prohibition of Article 2(4).

The introduction of Article 2(4) has led some modern authorities to the further view that the use of force in the protection of nationals abroad is, regardless of the form it takes, prohibited under modern international law.[3] It is, however, very doubtful whether Article 2(4) is broad enough to prohibit even the temporary landing of troops by one state in another state for the limited purpose of protecting its nationals in circumstances where the local authorities are either unwilling or unable to protect the nationals, and even when attempts by the United Nations Organization have failed or are impracticable.

Article 2(4) of the Charter does not prohibit the threat or

use of force simpliciter. The article refers to the threat or use of force "against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations."[4] An in-out armed operation by one state directed solely at the protection of its nationals in another state is of course bound to involve a technical violation of the territorial sovereignty of the latter state. But such an operation may not properly be described as being against the "territorial integrity or political independence of any state."[5] In other words, although Article 2(4) may constitute a general guarantee of the territorial integrity and political independence of member states, it may not provide members with a general guarantee of the inviolability of their territory.[6] The Israeli rescue operation at Entebbe, Uganda,[7] provides an example of such measures of protection of nationals abroad that may constitute a violation by one state of the territory of another, but which may not contravene the letter of Article 2(4) of the Charter. Indeed, during the Security Council debate over the operation, the Israeli Ambassador to the United Nations, Chaim Herzog, stressed this point. Citing O'Connell,[8] the Ambassador stated that:

> Article 2(4) of the United Nations Charter should be interpreted as prohibiting acts of force against the territorial integrity and political independence of nations, and not to prohibit a use of force which is limited in intention and effect to the protection of a state's own integrity and its nationals' vital interests, when the machinery envisaged by the United Nations Charter is ineffective in the situation.[9]

In the same argument, the Ambassador elaborated the Israeli argument, stating that

> . . . every effort must be made to get the United Nations to act. But if the United Nations is not in a position to move in time and the need for instant action is manifest, it would be difficult to deny the legitimacy of action in defence of nationals which every responsible government would feel bound to take if it had means to do so. This is of course on the basis that the action was strictly limited to securing the safe removal of the threatened nationals.[10]

Those who hold the view that Article 2(4) of the Charter forbids even such limited measures of protection have generally adopted a severely restrictive interpretation of Article 2(4) by which it is contended that the article constitutes an absolute prohibition of all threats or uses of force by member states in their international relations. First, it is argued that the phrase "against the territorial integrity or political independence of any state" was not intended by the framers of the Charter to qualify the otherwise absolute obligation to refrain from the threat or use of force. This view is partly reinforced by the fact that the phrase under consideration did not appear in the draft of the Dumbarton Oaks Conference. The draft simply read:

> All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.[11]

Although the phrase "in any manner inconsistent with the purposes of the Organization" would still have given rise to some problems in defining the scope of the obligation to refrain from the threat or use of force, this text was apparently more

comprehensive than the final text of Article 2(4). The phrase under discussion seems to have been added at the insistence of small nations which wanted the Charter to contain specific guarantees of the territorial integrity and political independence of states.[12] Thus, it is argued that the phrase under consideration was not intended to limit the comprehensive character of the obligation to refrain from the threat or use of force, "but on the contrary, to give more specific guarantees to small states".[13] This argument is, however, hardly persuasive. The plain and natural meaning of the text of Article 2(4) must be held to represent the intention of the framers of the Charter. There is nothing ambiguous or absurd or unreasonable about the textual meaning of Article 2(4) to warrant the giving of so much weight to the travaux preparatoires.[14] Indeed, in this regard, had the framers of the Charter intended merely to provide for specific guarantees against the territorial integrity and political independence of states, there are many conceivable ways they would have done so without obscuring the intention - if such was present - to create an absolute principle against the threat or use of force by states in their international relations.

Sometimes it has been contended or assumed that the concept of "territorial integrity" encompasses the idea of "territorial inviolability" so that even a temporary landing of troops on foreign territory for the limited purpose of protecting nationals could be said to constitute a violation of the "territorial integrity" of a state.[15] Yet the term

"territorial integrity" would appear to have a specific technical meaning which does not necessarily include "territorial inviolability". Even in common parlance, the word "integrity" is normally used to characterize "a state or quality of being complete, undivided or unbroken."[16] On the basis on this meaning of the word "integrity", the "territorial integrity" of a state may be said to be unaffected if there is no change in, or threat of change to, the physical, territorial frontiers of the state in question. Indeed, this would appear to be the meaning attached to the concept of "territorial integrity" in the transactions relating to the League Covenant. Article 10 of the Covenant which contained a guarantee "as against external aggression" of "the territorial integrity and existing political independence of all members" was understood by many officials and writers to constitute an attempt to prevent forcible changes in the existing territorial delimitations.[17] For example, in the House of Lords, Lord Curzon stated with reference to Article 10 of the Covenant that: "Aggressive war, aiming at territorial aggrandizement . . . is expressly forbidden under the guarantee of the members of the League."[18] And during the drafting of the Covenant, the strongest criticism of what was to beccome Article 10 was that it represented the preservation of the status quo, that it included the idea that "all territorial delimitations [were] just and expedient."[19] One reply to this criticism is itself illustrative of what was understood by the words "territorial integrity". It was stated that "the principle of Article 10 [was] merely that

forcible annexation [should] not result from external aggression."[20] In these statements, the concept of territorial integrity was clearly associated with the idea of the preservation of the physical frontiers and not with the idea of iviolability of territory.

It has also been argued that even if limited measures of force for the protection of nationals may not constitute a "threat or use of force against the territorial integrity or political independence of any state", such use of force is still inconsistent with the purposes of the United Nations in the terms of the last phrase of Article 2(4).[21] The first and primary purpose of the United Nations being the maintenance of international peace and security,[22] it is said that the landing of troops in another state, even temporarily for the limited purpose of protecting nationals, is inconsistent with the purposes of the United Nations because such use of force constitutes "a threat to peace" or "a breach of the Peace".[23] It must be observed, however, that any unilateral use of force by states in their international relations will likely constitute "a threat to peace" or "a breach of the peace". Even action in self-defence in accordance with Article 51 of the Charter may be viewed as constituting "a threat to peace" or "a breach of the peace" in the terms of Article 1(1) and also Article 39. The use of force need not be illegal in order to constitute "a threat to peace" or "a breach of the peace". This is so because neither Article 1(1) nor Article 39 is concerned with the question of legal responsibility. Bowett

points out in relation to Article 39 that the determination of whether or not that Article has become operative is primarily "not concerned with the problem of legal responsibility and the restrictive rights on the states immediately involved in the situation". The primary concern is the determination of a "situation of fact, a situation which contains the element of a threat to international peace and security".[24] Reference to "purposes of the United Nations" in Article 2(4) is primarily concerned with a different question of whether or not force has been resorted to lawfully or unlawfully. There is a functional difference between Article 2(4) on the one hand and Articles 1(1) and 39 on the other. Deducing the fact that some given form of use of force is prohibited under Article 2(4) merely because such use of force may constitute a threat to peace or a breach of the peace in terms of Articles 1(1) and 39 involves a confusion of the different functions of these provisions. It does not necessarily follow that because the use of force in the protection of nationals abroad may constitute a threat to peace, such use of force is inconsistent with the purposes of the United Nations. Moreover, it cannot be said that in every given case, to refrain from the use of force would best serve the purposes of the United Nations. Viewed in the total context of the Charter, the undertaking by members to refrain from the use of force is linked with guarantees that effective steps will be taken by the Organization for the suppression of unlawful acts and that international disputes will be settled in compliance with international law and justice. Indeed, where

such effective measures by the Organization are forthcoming, it would be inconsistent with the purposes of the United Nations for an individual state to unilaterally resort to force to safeguard its own interests. But it is a questionable interpretation of the purposes of the United Nations that even when the Organization is in no position to act, members should endure patiently any injurious conduct by states provided that such conduct does not take the form of armed force. It is worth noting in this connection that the promotion and encouragement of respect for human rights and fundamental freedoms is one of the expressed purposes of the United Nations.[25] To protect the lives of nationals abroad, in particular where the local authorities have displayed culpable inability or unwillingness to protect the nationals, is one of the obvious and most likely ways of enforcing human rights.[26] There is nothing in the Charter to support the view, implicit in the restrictive interpretation, that members ought, in all circumstances, to compromise other international values merely for the sake of avoiding even limited measures of force between states. Indeed,

> In terms of retaining state acceptance of the general norm against recourse to force, tolerance of illegal and unjust behaviour and failure to give legal sanction to self-help measures to protect legitimate vital interests is dangerous and puts a heavy, perhaps impossible, strain on the law governing recourse to force as a viable and relevant factor in international relations.[27]

The view that the use of force in the protection of nationals abroad would invariably be inconsistent with the purposes of the United Nations, does not appear to have any valid basis.[28]

Thus, although it is almost certain that most traditional forms of coercion justified on the ground of protection of nationals abroad may be deemed prohibited on the basis of Article 2(4) of the Charter, the principle against the use of force contained in this Article does not appear to be so broad as to outlaw even the recourse to limited measures of force aimed at the protection of nationals in certain circumstances.[29]

Nonintervention

Nonintervention is one of the other concepts that require consideration as possible bases for the claim that modern international law absolutely forbids the use of force in the protection of nationals abroad. In the theory and practice of customary international law during the nineteenth and early twentieth centuries, the notion of intervention - of which nonintervention is a derivative - was too vague to serve as a normative concept, and hence as a basis on which illegal conduct could be identified.[30] In fact, the term "intervention" was employed indiscriminately to refer both to "legal" as well as "illegal" conduct. The confusion that surrounded the notion of intervention was aptly portrayed by Winfield in the following words:

> The subject of intervention is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all.[31]

Even today a considerable amount of confusion prevails concerning the concept of intervention. Nevertheless, the quest

under modern state practice to establish a principle of nonintervention reflects a transformation in the concept of intervention. States have tended to reserve the term intervention for characterizing conduct which they regard as illegal. Thus, the concept of intervention under modern practice tends to acquire the distinctive normative content of illegality.[32]

The trend to establish nonintervention as a legal principle governing international relations was started by Latin American States. Indeed, perhaps no other group of states has so persistently asserted the principle of nonintervention as the American States. The first successful attempt to establish the principle of nonintervention among these states was at the Seventh Inter-American Conference, Montevideo, 1933 where a Convention on the Rights and Duties of States was adopted.[33] The United States, the most powerful state of the group, signed this Convention with a broad, if not vague, reservation of the rights "in the law of nations as generally recognized and accepted."[34] This made the Convention unsatisfactory to many American states. The duty of nonintervention was, however, accepted in a more sweeping fashion, even by the United States, during the Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936 in an additional protocol whose Article I rendered inadmissible the intervention of any of the signatory powers "directly or indirectly and for whatever reason in the internal or external affairs of any other of the parties."[35] The principle was reaffirmed at the Eighth

International Conference of American States, Lima, 1938,[36] and in the Act of Chapultepec, 1945.[37] The Principle has also been reiterated in the Bogota Charter of the Organization of American States (O.A.S.), 1948.[38] Article 15 of the Charter states that:

> No state or group of states has the right to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the state or against its political, economic, or cultural elements.

The trend has been followed by most Third World countries who have routinely reiterated the principle of nonintervention.[39] Countries of the communist bloc have also vigorously asserted the principle of nonintervention. However, these latter countries have a very disappointing record of interventions. Under the so-called "Brezhnev Doctrine", for example, communist countries, in reality the Soviet Union, feel entitled to intervene in another communist country if the cause of socialism in that country is threatened by capitalist forces.[40] It was on the basis of this doctrine that the Soviet Union and other countries of the communist bloc intervened in Czechoslovakia in 1968.[41] In general, while many states, big and small, frequently find occasions for intervention, the principle of nonintervention would appear to have received at least nominal acceptance by most states of the world.[42]

Although members of the United Nations continue to hold divergent views as to the nature and scope of the duty of

nonintervention, it would appear that in principle they do agree that "intervention" is delictual in character. Thus, in 1965 the United Nations General Assembly adopted Resolution 2131(xx) on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty and Independence.[43] Article I of the Resolution declared that:

> No state has the right to intervene directly or indirectly in the internal or external affairs of any state. Consequently, armed intervention and all other forms of interference or threats against the political or cultural elements are condemned.

The principle is reiterated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States.[44] Strictly speaking, these resolutions, like other resolutions of the United Nations General Assembly, do not have the effect of legally binding instruments.[45] Still, they do constitute evidence showing that members of the United Nations regard the content of "intervention" as necessarily delictual.

The issue that requires close examination in this discussion relates to the extent to which the principle of nonintervention under present international law goes in guaranteeing the inviolability of a state's territory. In particular, can it be said that the principle of nonintervention renders obsolete the claim by states to a right to land forces on foreign territory for the purpose of protecting the lives of nationals against imminent danger? It may be illustrative to examine this question with particular reference to the

principle of nonintervention as it has been established under the Inter-American system.

The acceptance of the principle of nonintervention by the American States, in particular by the United States, was, like the introduction of Article 2(4) of the United Nations Charter, bound to affect the broad customary law "right of intervention to protect nationals abroad". The protection of lives and property of nationals had accounted for most of the bombardments, landing of troops, blockades, occupations, and a variety of other coercive measures that had characterized the international relations of, in particular, the United States and Latin American Republics in the nineteenth and early twentieth centuries.[46] The quest by these republics to establish a general principle of nonintervention was essentially a reaction against the frequent incidents of forcible protection of the interests of foreign nationals by foreign powers. It is also of particular relevance that an earlier attempt in 1928 at Habana to bind the American States to a general principle of nonintervention had failed primarily because the United States, the most powerful member of the group, had refused to give up the "right" to protect its citizens abroad. The United States delegate of Habana had queried:

> What are we to do when a government breaks down and American citizens are in danger of their lives. . . ? I am not speaking of sporadic acts of violence or of the rising of mobs, or of those distressing incidents which may occur in any country, however well administered. I an speaking of the occasions where Government [sic]

> itself is unable to function for a time because of difficulties which confront it and which it is impossible for it to surmount.
>
> Now it is a principle of international law that in such a case a government is fully justified in taking action.[47]

It would thus appear natural to identify the acceptance of the principle of nonintervention with a withdrawal of the "right" to resort to coercive measures in the protection of the interests of nationals abroad.[48] Most forms of coercion justified on the basis of the customary law "right of protection of nationals abroad" have undoubtedly amounted to "intervention" even under the most strict definitions of that term. And as far as such forms of coercion are concerned, there should be little difficulty in admitting the identification of the acceptance of the principle of nonintervention with a withdrawal of the "right" to resort to coercion in the protection of nationals abroad. Like the discussion relating to Article 2(4) of the Charter,[49] the discussion under the present heading must, however, relate to cases involving limited measures of force on foreign territory directed solely at the protection of nationals faced with imminent danger against which there are no other practical means of protection. These cases, it will be observed presently, present some definitional problems.

It is not necessary here to repeat what has almost invariably occupied the opening remarks of any dicussion on intervention, namely, the problem of definition:[50]

> Virtually no consensus, even among specialists who have concentrated on the subject has emerged with respect to

> meaning and normative implications of the term. Efforts at definition have produced an unending chain of unsatisfactory results wherein the latest analysis more-or-less successfully demolishes preceding analyses and then sets up a new formulation which seems to be almost inevitably fated for demolition in turn.[51]

There is some support for the view that the temporary landing of troops on foreign territory for the limited purpose of protecting nationals may not properly be designated as "intervention". At the Habana Sixth Conference of American States, the United States delegate, Hughes, did not only state that the United States would not forego its right to protect its citizens abroad; he also contended that such protection of citizens was not intervention, but "interposition of a temporary character."[52] This distinction between "intervention" and "interposition" also appeared in a 1934 State Department memorandum which sought to argue that the forcible protection of nationals on foreign territory was an "interposition" and not an "intervention".[53] Even more illuminating was the view of Borchard who wrote as follows:

> The Army or the Navy has frequently been used for the protection of citizens or their property in foreign countries in cases of emergency where the local government has failed, through inability or unwillingness, to afford adequate protection to the persons or property of the foreigners in question. This action has by some writers been denominated as intervention and has given rise to much confusion, due to a failure to distinguish between political intervention and non-political intervention or interposition. The landing of citizens has practically always been free from any attempt to interfere in the internal affairs or administration of the country entered, and when confined to the purpose of assuring the safety of citizens abroad, or exacting redress for a delinquent failure to afford local protection, the action must be considered as a case of not intervention, but as non-belligerent interposition.[54]

Thus, the acceptance of the principle of nonintervention may not provide unequivocal evidence of a wholesale withdrawal of the claim to a right of forcible protection of nationals abroad. The adherence to the principle of nonintervention may easily be based on the assumption that certain forms of forcible protection of nationals abroad do not embody the characteristics of "intervention". Indeed, the practice of the United States subsequent to the numerous conventions establishing the principle of nonintervention tends to show that the United States continued to utilize the distinction drawn between "intervention" proper and mere "interpositions" of a temporary character." In 1965, for instance, the United States dispatched forces to the Dominican Republic "to preserve the lives of foreign nationals - nationals of the United States and many other countries" endangered by the civil strife that had broken out.[55] President Johnson denied that the dispatch of troops constituted an intervention:

> We did not intervene . . . but as we had to go into the Congo to preserve the lives of American citizens and haul them out when they were being shot at, we went into the Dominican Republic to preserve the lives of American citizens and of citizens of a good many other nations.[56]

The distinction between "intervention" and, what for convenience's sake can be called "interposition", would seem to derive logically from some of the most familiar definitions of intervention and even from the formulations of the principle of nonintervention in international instruments. These definitions and formulations tend to envisage situations within which mere violation of territory may not be included. The

definitions and formulations suggest as the essence of intervention interference by one state or other subject of international law in the affairs of another state, or compulsion by one state on another state to alter or maintain a certain state of things. In other words, "intervention" is viewed largely in terms of interference with the "political independence" of a state.[57] Oppenheim, for example, defines intervention as: " . . . dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual conditions of things."[58] Brierly states that intervention is a word which is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more specific sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence.[59] These definitions clearly underline as a central element of intervention the exertion of force (not necessarily armed force) by one state which compels another state to adopt a certain course of action in the conduct of its internal or external affairs.[60] The same conception of intervention is implicit in the formulations of the principle of nonintervention in international instruments like the Inter-American Conventions and the resolutions of the United Nations General Assembly.[61] A state would, on the basis of this conception of "intervention", plausibly deny the charge of having violated the principle of nonintervention by showing that its conduct is not aimed at maintaining or altering the actual condition of things in

another state, or at any rate that its conduct does not have that effect. This would be particularly true where a state merely temporarily lands its armed forces in another state for the limited objective of effecting protective measures in favour of its nationals confronted with imminent danger in the foreign state. In-out rescue operation aimed at evacuating nationals from the country of danger (for example, the 1976 Israeli landing at Entebbe, Uganda)[62] do undermine the territorial authority of the local sovereign.[63] Nevertheless, such operations cannot properly be said to constitute any "interference" in the "affairs" of another state. The case is different where a state purports to protect its nationals, not by evacuating them, but by coercing the other state into adopting changes, for example, in its institutional arrangements with regard to foreigners. Such would indeed amount to "interference" with the "affairs" of another state, like the 1900 "Boxer" Expedition against China.[64]

However, the term intervention is often employed to refer even to mere violation of territory. Thus Waldock who in fact defines intervention in terms of "interference with affairs" expresses the view that "The landing of forces without consent being unmistakably a usurpation of political authority, is prima facie intervention."[65] Indeed, although this tends to go beyond what seems to be suggested by most definitions of intervention and by the formulations of the principle of nonintervention, many states - in particular states of the Third World - employ the term intervention in this broad sense

to refer even to mere violations of territory.[66] This may, however, amount more to a demonstration of the confusion and recklessness with which states have employed the term intervention than to any clear evidence of a particular juridical understanding of the term. States have tended to use the term "intervention" more for political effect than as an accurate juridical description of conduct. This is nevertheless not to undermine the fact that the distinction drawn mostly by the United States between "intervention" and "interposition" has never really received general acceptance both by states and among legal commentators.[67]

It is, however, also worth remembering that "intervention" is sometimes still employed as a normatively neutral term, suggesting neither legality nor illegality. Indeed, it appears to be in this neutral sense that Waldock accepts the term "intervention" as a correct characterization of even the temporary landing of troops on foreign territory to protect the lives of nationals. For Waldock maintains in his views that such landing of troops constitutes a legitimate exercise of the right of self-defence.[68] When the term "intervention" is employed in this way, there is less need to give it a definite meaning than when it is employed to refer solely to illegal conduct. The attempts to dinstinguish between "intervention proper" and "interposition" may be viewed as a natural aspect of the tendency to employ the term "intervention" to refer solely to illegal conduct. The distinction could be viewed as an attempt to give the term "intervention" some definite legal content.

Nonaggression

"Aggression" is the term most encountered when states allege that one of their members has unlawfully resorted to force in its international relations.[69] Indeed, the whole process of attempting to limit the freedom of states to resort to force is just an aspect, an important one though, of the process of reinforcing the principle of nonaggression. A consideration of the claim that the use of force in the protection of nationals abroad is forbidden under modern international law would perhaps be incomplete without relating this form of use of force to the concept of aggression. Can it be said that by resorting to limited measures of force for the protection of its nationals abroad a state is inevitably committing an act of aggression?

It has been observed in the foregoing discussion[70] that Article 2(4) of the Charter, and also perhaps the principle of nonintervention, may not be interpreted as forbidding limited measures of force which merely violate the territory of another state. Violations of territory in general have, however, often been included among enumerations of acts considered to constitute aggression. For example, definitions of aggression proposed by the Soviet Union and discussed within the sphere of the United Nations General Assembly have included among possible acts of aggression by a state:

> The landing or leading of land, sea or air forces inside the boundaries of another state without the permission of the government of the latter, or the violation of the conditions of such permission, particularly as regards the

> length of their stay or extent of the area in which they may stay.[71]

Similar characterizations of the landing of troops inside the boundaries of another state appear in a number of Inter-American conventions.[72] The definition of "aggression" contained in the United Nations' General Assembly Resolution 3314 (xxix)[73] would also appear to be broad enough to include even mere violations of territory. The definition contained in the resolution represents a compromise between two opposing views, one favouring an enumerative definition and another a general definition.[74] The resolution contains in Article I a general definition of "aggression" and in Article 3 an enumeration of several possible particular acts of aggression. The general definition contained in Article 1 is clearly patterned on Article 2(4) of the United Nations Charter. The definition reads:

> Aggression is the use of force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the purposes of the United Nations.

Worth noting here is the fact that whereas the principle in Article 2(4) of the Charter is confined to the use of force against the "territorial integrity or political independence of any state", the principle in the Definition of Aggression Resolution extends also to the use of force against "the sovereignty" of a state. "Sovereignty" is a broader concept than territorial integrity" or "political independence". The former concept encompasses all aspects of the personality of a state and its authority structure, including territorial

sovereignty and inviolability.[75] Thus, whereas Article 2(4) may not be violated when a state resorts to force that merely violates the territory of another state, the principle of nonaggression as defined under the resolution would be infringed. Among the things enumerated under Article 3 of the definition as possible acts of aggression, the one that comes closest to covering even the temporary landing of troops appears in Paragraph I as follows:

> The invasion or attack by the armed forces of a state of the territory of another state or any military occupation, however temporary, resulting from such invasion or attack or any annexation by the use of force of the territory of another state or part thereof.

It is, however, possible that "invasion or attack" may only cover measures of force which are directed against the victim state as such, and not measures which are aimed at a different object, for example, the protection of nationals. In other words, Article 3 of the definition may exclude mere incidental violations of territory. The broad scope of the general definition in Article I may not, however, be reduced by invoking Article 3. Article 4 of the definition expressly provides for the non-exhaustive character of the list of possible acts of aggression appearing in Article 3.

It must be noted at this point that even under customary international law, the employment of force by one state within the territory of another state and without the authorization of the latter, is prima facie unlawful: "The jurisdiction of the nation within its territory is necessarily exclusive and absolute."[76] In his note to the British Plenipotentiary,

Webster, the United States Secretary of State stated that: " . . . respect for the inviolable character of the territory of independent states is the most essential foundation of civilization."[77] Another United States Secretary of State also stated that: "A sovereign state . . . can not exercise the prerogative of sovereignty in any dominion but his own."[78] In 1927, the Permanent Court of International Justice stated the principle as follows:

> Now the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state.[79]

And the International Court of Justice has reiterated the principle that "between sovereign independent states, respect for territorial sovereignty is an essential foundation of international relations."[80]

Of course the customary law principle of territorial inviolability is not absolute.[81] These are circumstances when the rights of other states have to be given precedence over the territorial inviolability of a state. This is particularly the case when other states are exercising their right of self-defence. This relative character of the inviolability of the territory of a state is also inherently recognized in the United Nations General Assembly Resolution 3314 (xxix) concerning the definition of aggression. Conduct in apparent contravention of the resolution may not necessarily constitute aggression. Under Article 2 of the resolution the Security Council may "in conformity with the Charter conclude that a determination that

act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." Article 2 of the resolution would be of particular relevance to a case where one state temporarily violates the territory of another in order to protect its own vital interests against irreparable harm.

With specific reference to the use of force in the protection of nationals abroad, the Soviet Union made an attempt to exclude, among other things, the protection of nationals as a justification for armed violation of another state's territory. In its proposed definitions of aggression, the Soviet Union persistently particularized "any danger which may threaten the life or property of aliens" as not giving any right to 'cross the frontier' of another state."[82] There were, however, strong objections to the listing of cases which would not constitute justifications for armed action by states. It was rightly argued that such listing

> would almost amount to an invitation to countries to embark on certain types of illegal courses in the knowledge that no forcible action would be taken against them in return, or that if such action were taken, it could at once be stigmatized as constituting aggression.[83]

With particular reference to the exclusion of the protection of nationals as a justification for the use of armed force, the government of the United Kingdom expressed the view that:

> . . . by mistreating foreigners on its own territory, a state committed an act of aggression against the country of which the foreigners were nationals: and in defending itself, the state concerned was exercising the right of self-defence.[84]

Thus, the Soviet attempt to characterize the use of force in the protection of nationals abroad as invariably amounting to aggression, failed to command the general acceptance of states. However, the claim that the use of force in the protection of nationals abroad constitutes an exercise of the right of self-defence under post-1945 international law, and hence an exception to the principle of territorial inviolability, requires more detailed examination.

NOTES: CHAPTER 2

[1]It will be observed shortly that several attempts by the Soviet Union to introduce into an international instrument a specific provision against the use of force in the protection of nationals abroad failed to materialize.

[2]Supra chapt. I, esp. nn. 49-50.

[3]See De Visscher, Theory and Reality in International Law (1957), p. 159 n. 47. See also Phillip Jessup, A Modern Law of Nations (1948), p. 169; R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), p. 176; J.E.S. Fawcett, "Intervention in International Law: A Study of Recent Cases", 103 R.C. (II, 1961), p. 347 at 404; Brownlie, op. cit., p. 298. During the Security Council debate over the Israeli rescue operation at Entebbe, Uganda, most representatives of the Third World states which participated in the debate shared this view. See U.N. Yearbook, 1976, pp. 316-19. [The case will be considered in detail in the final chapter of this study where post-1945 practice is reviewed].

[4]See Julius Stone, Aggression and World Order (1958), p. 95; Bowett, Self-Defence in International Law, p. 152, also cap. 2, p. 29 seq.; L.C. Green, "Rescue at Entebbe - Legal Aspects" 6 Israel YB. On Human Rights (1976), p. 324 at 326; Richard Lillich, "Forcible Self-Help by States to Protect Human Rights", 53 Iowa L.R. (1967), p. 325, p. 336, also "Humanitarian Intervention: A Reply to Ian Brownlie", in Law and Civil War in the Modern World (1974), p. 229, at pp. 236-37 (edited by John Norton Moore); M. McDougal "Authority to Use Force on the High Seas" 20 Naval War College Rev. (1967), p. 19 at pp. 28-9; McDougal and Reisman "Rhodesia and the United Nations: The Lawfulness of International Concern", 62 A.J.I.L. (1968), p. I; O'Connell, International Law (1970), p. 303.

[5]See citations in n. 4 above.

[6]See Bowett, op. cit., p. 31.

[7]See remarks about this case in n. 3 above.

[8]Ibid.

[9]See 15 Int. L.M. (1976), p. 1226. A similar argument

about Article 2(4) had been pursued by the British Representative before the International Court of Justice, Sir Eric Beckett, in connection with the Corfu Channel Case (Merits). But the problem in that case did not relate to the protection of nationals abroad; the problem concerned the legitimacy of measures of force aimed at securing evidence for judicial proceedings. See I.C.J. Pleadings and Oral Arguments, Corfu Channel Case, Vol. III, pp. 295-99, and Vol. IV, p. 581.

[10]15 Int. L.M. (1976), p. 1228.

[11]6 U.N.C.I.O., pp. 557, 720.

[12]Ibid.

[13]See Brownlie, op. cit., p. 267.

[14]See Conditions of Admission of a State in the United Nations Case I.C.J. Rep. 1948, p. 63. Also, S.S. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", 28 British Yb. Int. Law (1951), p. I and 33 British Yb. Int. Law (1957), p. 203.

[15]See H. Kelsen, Collective Security Under International Law (1957), p. 62; Brownlie, op. cit., p. 268. During the Security Council debate over the Israeli rescue operation at Entebbe, several representatives expressed the belief that Israel, by temporarily landing troops in Uganda for the limited purpose of evacuating its nationals, had violated the territorial integrity of Uganda. See U.N. Yearbook, (1976), pp. 316-19. It is worth noting that the representatives were expressing political and not legal opinions and may consequently have been less concerned with precision in their terminology.

[16]Webster's International Dictionary (1934), p. 1290.

[17]Fischer Williams, Some Aspects of the League Covenant (1934), pp. 103-107.

[18]Debate of 6 July, 1919. See Parl. Deb., H of L. XXXV, col. 37.

[19]Hunter-Miller, The Drafting of the Covenant (1928) pp. 354-358. The Canadian delegation was the chief exponent of this view.

[20]Ibid., p. 354.

[21]See e.g. De Visscher, Theory and Reality in International Law (1957), p. 159, n. 47; Jessup, A Modern Law of Nations, p. 169.

[22]Art. 1(1).

[23]See Jessup, Ibid.

[24]Op. cit., p. 152.

[25]Art. 1(3) of the Charter.

[26]See Chapt. 4 below.

[27]The Law of Limited Armed Conflict (1965) (A Study by the Institute of World Policy, Georgetown University), p. 24.

[28]See also comments by R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), p. 220. Bowett, op. cit., p. 180. The judgement of the I.C.J. in the Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. (1980), p. 3, in which the United States attempted rescue operation in Iran was severely criticized (see para. 93 of the Judgement) cannot really be invoked to support the restrictive interpretation. The Court's criticism was narrowly confined to the consistency of the U.S. operation with the proceedings of the Court relating to the hostage crisis in Iran. In fact, the Court expressly stated that its observations had nothing to do with the legality of the operation under the Charter of the United Nations and under general international law (see Para. 94). See Chapt. 5 below, nn. 101-109 for further comment on the case.

[29]See Chapt. 3 below for a detailed examination of the scope of this "right" to employ force in the protection of nationals abroad.

[30]See discussion in Chapt. 1 above, n. 11.

[31]P.H. Winfield, "The History of Intervention in International Law", 3 British Yb. Int. Law (1922-23), p. 130.

[32]See a more or less similar observation by Thomas and Thomas, Non-Intervention (1956), p. 71.

[33]Hudson, 6 International Legislation (1932-34), p. 620.

The Convention entered into force on Dec. 26, 1934. It is stated in Art. 8 of the Convention that "no state has the right to interfere in the internal or external affairs of another". Some earlier attempts to establish a general principle of nonintervention among the American states had proved abortive. The United States was mainly responsible for these failures. It was the United States which at the Habana Sixth Conference of American States, 1928, had foiled the attempt to include a duty of nonintervention among the resolutions of the Conference. [See Report of Delegates of the United States at the Sixth Conference of American States, Washington, 1928, pp. 14-15]. For a survey of these earlier attempts, see Thomas and Thomas, op. cit., pp. 55-61.

[34]Hudson, 6 International Legislation, p. 625.

[35]Hudson, 6 International Legislation, p. 626.

[36]3 T.I.A.S. (1931-1945), p. 534.

[37]Hudson, 9 International Legislation, (1962-1945), p. 283. The Act entered into force on March 8, 1945.

[38]See 2 U.S.T., p. 2394.

[39]See for example, Art. 3(2) of the Charter of the Organization of African Unity (O.A.U.), 3 Int. L.M. (1964), p. 1116.

[40]See G.I. Tunkin, Theory of International Law (1970) (English tr. by Butler, 1974), p. 440. See also W.E. Butler, "Socialist International Law or Socialist Principles of International Relations", 65 A.J.I.L. (1971), p. 796.

[41]Documents on the Crisis appear in 7 Int. L.M. (1968), pp. 1268-1334. The U.N. Special Committee on Principles of International Law criticized the intervention as contrary to Art. 2(4) of the Charter, the principle of nonintervention and the principle of self-determination. See 7 Int. L.M., pp. 1317-1320.

[42]Indeed, far from denying the existence of a duty of nonintervention, states resorting to "intervention" have usually excused their acts either by claiming the existence of certain exceptions to the principle of nonintervention or by denying in fact that their conduct has amounted to intervention. See e.g. nn. 40-1 above; and the U.S. intervention in the Dominican Republic, 1965 (see n. 56 below) which was partly justified on the basis of preventing a

communist takeover. The U.S. intervention in Lebanon, 1958, was justified largely on the basis of invitation (see Chapt. 5 n. 11 below). In her intervention in East Pakistan, India invoked the right of self-defence and the doctrine of humanitarian intervention (see Chapt. 4, nn. 56-61). "Invitation" and the concept of collective self-defence were invoked by the U.S. in its attempt to prove that it had not "intervened" in Lebanon in 1958. (See Chapt. 5, text to n. 12).

[43]U.N.Yb. 1965, pp. 94-5. The Resolution was adopted by 109 votes to 0 with 1 (United Kingdom) abstention. The United Kingdom accepted the fundamental propositions set out in the resolution, but objected to the hasty drafting and the vague and imprecise language of the Resolution, see cmnd 3079, p. 44, para. 102. The U.K. was also skeptical about the Soviet initiative in introducing the motion on nonintervention before the General Assembly; the U.K. suspected that the Soviet Union had initiated the adoption of the resolution merely to create an opportunity for launching another ideological attack against the Western powers, in particular the U.S. Indeed, the initial Soviet proposal was highly subjective and one-sided. It left the vague impression that intervention was an evil solely associated with the Western powers and that it largely consisted of conduct which obstructed the aims and efforts of (rather ill-defined) "independence movements" of "peoples". See U.N. Yearbook, 1965, pp. 87-94 for the report of the proceedings leading to the adoption of the Resolution.

[44]General Assembly Resolution 2625 (XXV) of 1970, 9 Int. L.M. (1970), p. 1292. The Resolution was adopted without vote.

[45]Contrary views were expressed by the Soviet Union and some Third World countries. [See Report of the Special Committee, 1966, U.N. Doc. A/6230, p. 67; U.N. Yearbook, 1965, pp. 87-89]. These countries asserted that the resolutions, in particular Resolution (2131 XX), constituted an authoritative and binding interpretation of Art. 2(4) of the Charter. The principle of nonintervention in these resolutions is, however, far much broader than Art. 2(4) and does not appear to be a conscious attempt to explain the principle of Art. 2(4). Whereas Art. 2(4) is confined to the use of force, the principle of nonintervention appears also to cover conduct that may not properly be characterized as a use of "force". Rightly, some countries, in particular the United States, expressly rejected the assertion that the resolutions had the character of legally binding instruments. See e.g. Report of the Special Committee, 1966, Ibid.

[46]See Thomas and Thomas, op. cit., mainly Chapt. II, p. 15 seq. and also supra. Chapt. I. nn. 17-31.

[47]Report of the Delegate of the United States of America to the Sixth International Conference of American States, Washington, 1928, pp. 14-15.

[48]See, for example, the observation of Brownlie, that the acceptance of the principle of nonintervention by the U.S. at the Montevideo Conference of 1933 constituted "prima facie evidence of a withdrawal of the claim to a right of intervention to protect lives and property of nationals". Op. cit., pp. 96-7; also Thomas and Thomas, The Dominican Crisis, 1965 Ninth Hammarskjold Forum (1967), p. 13; and Franck and Rodley, "After Bangladesh, the Law of Humanitarian Intervention", 67 A.J.I.L. (1973), p. 275 at p. 283, n. 36.

[49]See supra, n. 5 of this chapt.

[50]The following are among the works that have dwelt on the problem: P.H. Winfield, op. cit., Grob, op. cit., pp. 226-27; The Law of Limited International Conflict (Institute of World Policy), p. 38; McDougal and Feliciano, Law and Minimum World Public Order (1961), pp. 207-208; J.E.S. Fawcett, "Intervention in International Law: A Study of Recent Cases", 103 R.C. (1961, II), p. 347; Q. Wright, "Intervention", 51 A.J.I.L. (1957), p. 257; Charles Fenwick, "Intervention: Individual and Collective", 39 A.J.I.L. (1945), p. 645; Kelsen-Tucker, Principles of International Law (1966), pp. 73-76; Thomas and Thomas, Non-Intervention, in particular chapt. II; see also Whiteman, 5 Digest, s. 19, pp. 321-24.

[51]The Law of Limited Conflict, p. 38.

[52]See n. 47 of this chapt.

[53]J.P. Clark, The Right to Protect Citizens in Foreign Countries by Landing Forces (1934), see also Waldock, 81 R.C., p. 467.

[54]The Diplomatic Protection of Citizens Abroad, p. 448.

[55]See Chapt. 5 for a detailed examination of the case.

[56]53 Dept. State Bull. (1965), p. 934.

[57]McDougal and Feliciano, [op. cit., p. 177] note that "Political independence"

> . . . is commonly taken most comprehensively to refer to the freedom of decision-making or self-direction

customarily demanded by state officials. Impairment of "political independence", as an attack upon the institutional arrangements of authority and control in the target state, thus involves substantial curtailment of the freedom of decision-making through the effective and reduction of the number of alternative policies open at tolerable costs to the officials of that state. It may further consist of an attempt to construct the process of decision-making in the target state, to modify the composition or membership of the ruling elite group, and perhaps, to dislodge that group completely and to substitute another more acceptable to the attacking state.

[58]I, International Law (1954), p. 305. For more or less similar definitions see Whiteman, 5 Digest, pp. 321-24.

[59]See The Law of Nations (1954), p. 402.

[60]See William V. O'Brien, U.S. Military Intervention: Law and Morality, Washington Papers, vol. VII, No. 68, p. 16.

[61]See supra. nn. 33-45 of this chapt.

[62]See chapt. 5, n. 74.

[63]On the other hand, such operations will also likely suggest an inability or unwillingness of the host state to fulfil its legal obligations in relation to the exercise of its territorial sovereignty.

[64]See nn. 35-41 of chapt. 1.

[65]81 R.C. (II, 1952), p. 467.

[66]See chapt. 5 below.

[67]See Lillich, 53 Iowa L.R., p. 331; Fenwick, 39 A.J.I.L. (1945), p. 646. These writers, though commending the distinction, admit that it has never become part of customary international law.

[68]81 R.C. (II, 1952), p. 464. See also Brierly's Law of Nations (1963), pp. 423-28. The reference to intervention in Art. 2(7) of the Charter may also be of this nature. In that article, it is possible to view "intervention" merely as a descriptive term signifying interference by the U.N. in the domestic affairs of a state; so that "intervention" itself may

be lawful or unlawful depending on the circumstances. Thus, the U.N. may lawfully intervene in such affairs of a state which are not essentially within the domestic jurisdiction of the state, or in matters which fall under Chapter VII of the Charter relating to the application of enforcement measures.

[69]Valuable literature on the subject includes, Harvard Research Draft Convention and Comment on Rights and Duties of States in Case of Aggression, 33 A.J.I.L. (1939), suppl., p. 819; Benjamin Ferencz, Defining International Aggression (1975), 2 Vols.; John N. Hazard, "Why Again to Define Aggression?" 62 A.J.I.L. (1968), p. 701; Waldock, 81 R.C., pp. 506-14; Julius Stone, Aggression and World Order (1958); Brownlie, op. cit., cap. XI, p. 351; Bowett, op. cit., cap. XI, p. 249; Ahmed Rifaat, International Aggression (1979); see also Whiteman, 5 Digest, p. 719 seq., and L.C. Green, "Armed Conflict, War and Self-Defence" 6 Archiv des Volkerrechts (1956-57), p. 386.

[70]nn. 2-68 of this chapt.

[71]Soviet Proposal to the International Law Commission, Nov. 4 1950, U.N. Doc. A/C.I./608, esp. Art. 1(d); also Proposal of Jan. 5, 1952, U.N. Doc. A/C.6/L.208; and of Oct. 23, 1956, U.N. Doc. A/AC.77/L.4.

[72]See for example, the Montevideo Convention On Rights and Duties of States, 1933. (See n. 33 on this chapt.) Art 11; The Final Act of Chapultepec, 1945 (n. 37 of this chapt.), Art. 3; and the Charter of the O.A.S. (n. 38 of this chapt.), Art. 17.

[73]Adopted by consensus on Dec. 4, 1974, see 13 Int. L.M. (1974), p. 710.

[74]See Waldock, 81 R.C., pp. 506-14.

[75]This appears to have been the majority view in the Sixth Committee of the U.N. General Assembly. The Soviet Union had objected to the inclusion of the word "sovereignty", arguing that force used against "political independence" was practically the same thing as force used against "sovereignty". The retention of the word in the definition strongly suggests that the majority of the members of the Committee did not agree with this interpretation of the term "sovereignty". [See U.N. Yearbook, 1974, p. 843]. It is also possible to view the inclusion of "sovereignty" as a concession to Third World countries, who understandably have exhibited much anxiety with respect to the maintenance of their sovereignty. To most of

these countries "sovereignty" has become more or less a motherhood principle. [Note: among the countries that pressed for the inclusion of "sovereignty" were Yugoslavia, Indonesia, and Greece.] See A/A.C.136/S.R.1442, 13; A/A.C.134/S.R.1442, 15; A/A.C.134/S.R.1444, 3; A/A.C.134/S.R.1482, 12.

[76]Marshall, C.J. in Schooner Exchange V McFaddon (1812); F. Cranch, 116, 136; Moore, 2 Digest, cap. VI, s. 175, p. 4. See also pp. 4-16 for more statements to the same effect.

[77]Moore, 2 Digest, s. 217, p. 412.

[78]Sec. of State Jefferson, in a note to the French Minister, Mr. Terrant; Moore, 2 Digest, s. 209, p. 362.

[79]S.S. Lotus, P.C.I.J. Series A. No. 10, p. 4 at p. 18.

[80]Corfu Channel Case (Merits), I.C.J. Rep. 1949, p. 4 at p. 35.

[81]See Bowett, op. cit., p. 31. Indeed, in the practice of states during the nineteenth and early twentieth centuries, the "rights" that took precedence over territorial sovereignty were so numerous and so vague that the principle of territorial sovereignty existed in name only, at least in the relations between powerful and weak states.

[82]See n. 71 of this chapt.

[83]Statement by the British representative, G.G. Fitzmaurice, on Jan. 9, 1952, U.N. Doc. A/C.6/SR 281.

[84]Ibid.

CHAPTER 3

THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD AND THE RIGHT OF SELF-DEFENCE

The identification of the use of force in the protection of nationals abroad with the right of self-defence, though readily and even indifferently admitted during the nineteenth and early twentieth centuries,[1] has become a matter of some controversy under modern international law.[2] Some modern authorities, by adopting what can be called a "restrictive" interpretation of the right of self-defence, have been inclined to reject the extension of the justification of self-defence to apply even to the use of force in the protection of nationals abroad.[3] In the view of these authorities, the "self" of self-defence must be understood to apply only to the domestic territory and the citizens within and not to citizens residing abroad. In addition to this restriction, they also hold that self-defence must be a response to "an armed attack". Article 51 of the Charter of the United Nations which deals with members' right of individual and collective self-defence, has generally been invoked to support this view.[4] The relevant part of the article reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security.

The article is interpreted in the context of an all-embracing

norm against the use of force by states.[5] In this context, members could not have any right of self-defence independently of Article 51. The right cannot have any content other than the one determined by Article 51.[6] There would, however, appear to be little in this interpretation of the Charter which makes it imperative to exclude from the category of self-defence the use of force in the protection of nationals abroad. The Charter does not define "armed attack"; in particular, it does not specify what elements of a member state should be object of an armed attack in order to justify the exercise of the right of self-defence. Thus, even admitting for the sake of argument that the Charter permits self-defence only as a response to an armed attack, the right contained in Article 51 may still be given a broader scope than the one suggested under the restrictive interpretation. Acts of violence against nationals of a member state in a foreign country may, in certain circumstances, plausibly be held to constitute an "armed attack" against the member state.[7] This would be particularly true where nationals in a foreign country are being attacked simply or largely because of their nationality and where such acts of violence involve state complicity. In such cases, the attack upon the nationals can be conceived as an attack against the state of nationality, not merely because of the natural law assumption that "whoever ill-treats a citizen indirectly injures the state",[8] but also because the injury to the citizen may in fact be intended to constitute a challenge to the state of nationality. The

recent Iranian attack against the diplomatic and consular staff and other citizens of the United States provides an appropriate example of such situations.[9] There is, however, no need to go into any detailed analysis of this argument. The entire view that the Charter restricts the right of self-defence to a reaction against an actual armed attack constitutes a fundamental misreading of the Charter,[10] influenced perhaps by an over-sanguine view of the effectiveness of the United Nations in guaranteeing international security.

The opening words of Article 51 read: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence. . . ." These words clearly indicate the nature of Article 51. The article is not constitutive of any new right but merely declaratory of an existing right. Article 51 is not intended to circumscribe the existing right of self-defence but merely to recognize its existence.[11] Understood in this way, Article 51 thus only transforms into treaty form a view that had long been entertained by states in relation to the major pre-World War II treaties limiting the freedom of states to use force in their international relations.[12] States regarded the right of self-defence as automatically excepted from these limitations. In the words of Kellog: "that right is inherent in every sovereign state and is implicit in every treaty."[13] That states held the same view with regard to the Charter of the United Nations is further evident from the fact that the original Dumbarton Oaks proposals contained no express reservation of the right of self-defence.

At San Francisco, Committee I, which dealt with Article 2(4) of the Charter, held the view that the "use of arms in legitimate self-defence remains unimpaired".[14] The Charter, like its precursors,[15] was to contain no express reservation of the right of self-defence. What is now Article 51 originated in the deliberations of Committee III/4 and its sub-Committee III/4A dealing with regional arrangements such as the Inter-American Organization under the Act of Chapultepec.[16] The article was inserted in the Charter primarily for the purpose of clarifying the position with regard to collective undertakings for mutual defence. There were anxieties as to the possible conflict of roles between the Security Council and regional organizations, particularly in the event of an emergency. It was felt that some measure of flexibility in relation to action taken by regional organizations would be necessary in such an event. In fact, several proposals that were submitted specifically referred to regional arrangements.[17] These were, however, turned down in favour of a British proposal which in substance contained the terms of Article 51.[18] Article 51 was not inserted in the Charter to define or limit self-defence. The right of self-defence formerly available to states by virtue of general international law is still available to members of the United Nations. That right has not been renounced.

The restrictive interpretation of the right of self-defence is influenced by the belief that the Charter contains an absolute norm against the threat or use of force by states.[19]

It is believed that all use of force by states in their international relations is initially forbidden by the Charter. According to the restrictive interpretation, the only lawful use of force is that which is expressly authorized by the Charter; any use of force which is not expressly permitted by the Charter is automatically or necessarily illegal. Hence, measures of force in self-defence are lawful only because they are expressly excepted under Article 51 of the Charter. Although Article 51 of the Charter speaks of the "inherent right of self-defence", thereby making it apparent that self-defence is a reservation of an existing right and not a grant by the Charter of any new right, the scope of the right reserved is necessarily limited by the terms of Article 51. However, it has already been observed that Article 2(4) of the Charter, which contains the primary principle against the use of force, is not absolute in character.[20] That article only forbids such threat or use of force as is against the territorial integrity or political independence of a state or is in any manner inconsistent with the purposes of the United Nations. Thus, members of the United Nations are not only entitled to those measures of protection which are expressly permitted by the Charter, but also to measures of protection which are permitted by general international law except insofar as such measures are inconsistent with the express provisions of the Charter.[21] By its very definition,[22] self-defence does not fall within the terms of Article 2(4).

It is precisely because self-defence cannot be by

> definition "against the territorial integrity or political independence of any state that the opinion could be held at San Francisco that the right of self-defence was left unimpaired by Article 2(4).[23]

The customary law of self-defence may be said to be curtailed by the Charter only insofar as "self-defence" has sometimes been loosely employed to characterize any form of forcible self-help. In particular, during the nineteenth and early twentieth centuries, for example, "self-defence" was an elastic concept which was also inextricably associated with the vague doctrines of "self-preservation", "self-protection", and the "right of intervention".[24] The conclusion that the customary law right of self-defence has not been renounced does not mean a reversion to the vague doctrines of pre-1945 international law.[25] During that period, "self-defence" was asserted against a background of licence, a background characterized by the absence of any clear distinction between the legal and the illegal resort to force by states.[26] The norm against the use of force which characterizes modern international law has, to a large extent, at least theoretically, transformed that background. Thus, in asserting their inherent right of self-defence members are bound to take into account the terms of Article 2(4) of the Charter as read together with Article 2(3). Various forms of coercive measures which formerly used to be claimed as constituting exercises of the right of self-defence may no longer be permissible because of their inconsistency with the obligations under Article 2(3) and (4) of the Charter.[27] Operating as it now does in the context of principles enjoining

states to refrain from the use of force in their international relations and to settle their international disputes by peaceful means, self-defence has acquired an exceptional character. Instead of serving merely as a tool of power politics as it used to do during the nineteenth and early twentieth centuries, self-defence may now more readily serve as a juridical concept. Indeed, while the very nature of self-defence makes it necessary for individual states to decide on their own whether particular situations require the resort to force in self-defence, a state resorting to force can no longer claim to be the sole and ultimate judge of its own actions. In the words of the International Military Tribunal at Nuremberg:

> . . . But whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.[28]

The Customary Law Right of Self-Defence and the Protection of Nationals Abroad

The customary law right of self-defence is not restricted to the defence of a state's territorial domain against actual armed attack.[29] The right extends to the protection of other legitimate rights which may in fact be endangered by measures other than direct armed attack.[30] This interpretation of self-defence appears to underlie some conclusions of the International Court of Justice in the Corfu Channel Case (Merits);[31] although it must be admitted that the relevance of the judgement to the interpretation of self-defence is not

entirely certain.[32] At the hearing of the merits, the Court was mainly concerned with two issues. First, it had to consider Albania's responsibility for explosions along the Albanian territorial waters of the Corfu Channel which had resulted in damage to British warships and loss of lives among the British crews, on October 22, 1946. Secondly, the Court had to consider the legality of the passage of the British warships through the Corfu Channel on the date of the explosions and the subsequent British action in sending units of the Royal Navy which, without Albanian consent, swept for mines in Albanian territorial waters on 12-13 November, 1946. The issues relevant to the present discussion are those that relate to the question of the legality of the British action in sending warships through the Channel on October 22. The passage followed an incident on May 15, 1946 where British warships passing through the Corfu Channel had been fired upon by Albanian coastal batteries. The Government of Albania claimed that the British Government had violated Albanian sovereignty by sending warships through the strait without having obtained the previous authorization of the Albanian Government. This claim was rejected by the Court. The Court arrived at the conclusion that the North Corfu Channel belonged to a class of international highways through which passage could not be prohibited by a coastal state in time of peace.[33] The Albanian Government had, however, further contended that the passage of the British warships on October 22 was not an innocent passage. The ships had passed through the straits with the intention to assert

their right of passage and to test Albanian reaction; the crews were at action stations with authority to fire if attacked.

To this contention, the Court replied that:

> The Albanian Government, on May 15, 1946, tried to impose by means of gunfire its view with regard to the passage. As the exchange of diplomatic notes did not lead to any clarification, the Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships. The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.[34]

The Court stated further that:

> . . . the intention of the Government of the United Kingdom must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case . . . the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty. . . .[35]

It is worth noting that the preparatory measures taken by the British Government during the passage of October 22 were largely defensive in character, and hence significantly contrasted with the mine-sweeping operation of November 12-13. This latter operation took almost a purely self-help, enforcement, character and was strongly condemned by the Court

> . . . as the manifestation of a policy of force, such as has in the past, given rise to most serious abuses and such as cannot, whatever the present defects in international organization, find a place in international law.[36]

In the judgement, the Court did not, however, specifically refer

to the right of self-defence nor was there any mention of Articles 2(4) and 51 of the Charter. Self-defence was also never specifically raised by the United Kingdom as a justification for the passage of its warships on October 22, 1946.[37] This absence of any specific reference to the right of self-defence may suggest that the Court did not view self-defence to be relevant to the matter at hand. The implications of the Court's pronouncements may have to be confined to the specific context of the right of innocent passage.[38]

Yet, in the first of the pronouncements cited above,[39] the Court appears to clearly recognize a general principle that a state may affirm (defend) a right which has been unlawfully denied (attacked), even though such affirmation may involve preparations for or even the actual use of force.

> . . . the Court, having found that there was, under international law, a right of innocent passage through international straits connecting two parts of the high seas, even though these consisted of the territorial waters of some state, found in addition, that if an attempt were made by force, or by a clear threat of it, to deny or obstruct such passage, there would be and was a right to assert it by force or by a threat to use force if necessary in order to exercise the right.[40]

An important aspect of the British "mission" was the demonstration of force. And this was expressly noted by the Court in the second of the pronouncements quoted above.[41] In commenting upon the legality of the passage and the intentions of the British Government, the Court could not have failed to take cognizance, at least implicitly, of the general principles of international law governing the use of force by states in their international relations.[42] The Court took the view that

the British action of October 22, 1946, was capable of being consistent with international law. Once it is conceded that the threat of force by states can only be an exception to the principle against the threat or use of force if it is resorted to as a measure of self-defence, the Court's remarks must be held to have a bearing on the interpretation of self-defence. If these deductions are accepted, it becomes inevitable to conclude that the Court did not take a narrow view of self-defence.[43]

The formulation of the principle of self-defence in terms of the protection of legal rights cannot, however, mean that the enjoyment of <u>any</u> right under international law may be supported by recourse to force in self-defence. Such a view of self-defence would certainly weaken the exceptional character of the right of self-defence. Self-defence must be restricted to the protection of those rights or interests which are vital to the security or existence of a state.[44] This is indeed implicit in the governing rules which customary international law imposes on the exercise of the right of self-defence.[45] Admittedly, the range of these rights or interests which can be protected by resort to force in self-defence has never been sufficiently determined. During the nineteenth and early twentieth centuries, such rights and interests were numerous, a condition which was largely due to the indifference of the law with regard to the distinction between permissible and impermissible coercion, and hence, with regard to the proper scope of self-defence.[46]

Theoretically, the range of these rights should be capable of determination by an "empirical method", involving the "analysis of the rights which, according to the practice of states, have been deemed capable of protection by the exercise of self-defence".[47] The range of rights determined by this method will necessarily reflect the effectiveness of international guarantees for the protection of essential rights of states. It ought to diminish or expand in inverse proportion to the effectiveness of such guarantees. In this study no attempt will be made to analyze all the rights which may be said to be capable of protection by self-defence.[48] The study will be confined to the analysis of the right of protection over nationals abroad. Is the right among those rights capable of protection by self-defence? If so, can the exercise of the right conform to the legal conditions governing the right of self-defence under modern international law? Or, put differently, how does its subjection to the governing rules of self-defence affect the nature and scope of the right of protection over nationals abroad?

Needless to say, the first question largely calls for an examination of modern state practice. Do states in fact regard the protection of nationals abroad as an aspect of self-defence? An independent examination of post-1945 state practice appears in the final chapter of the study. In this chapter, it will be sufficient merely to note that many jurists and commentators on post-World War II international law do support the view that the right of protection over nationals abroad constitutes a

legitimate aspect of self-defence even under modern international law.[49] The remaining questions involve an attempt to outline the scope and main characteristics of this aspect or extension of the right of self-defence which relates to the protection of nationals abroad. For indeed, it would appear possible to trace from the discussions on the subject, some definite doctrine of what for the sake of convenience shall be referred to as the "right of self-defence for the protection of nationals abroad".

The Nature and Scope of the Right of Self-Defence for the Protection of Nationals Abroad

The right of self-defence for the protection of nationals abroad is, as it appears in the literature on the subject, essentially a hybrid of traditional principles of the institution of State Responsibility for Injuries to Aliens and the principles governing the exercise of the right of self-defence.[50]

The conditions for the lawful exercise of the right are essentially those which customary international law imposes upon the exercise of the general right of self-defence.[51] These conditions were classically stated by Webster, the United States Secretary of State, in a note of 6 August, 1842 to Lord Ashburton in connection with the McLeod case arising from the Caroline incident.[52] As minimum justification for its action in destroying the ship Caroline within United States' territorial waters, Webster demanded the British Government to

show the existence of a

> . . . necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.[53]

The authority of this statement of the law of self-defence was significantly enhanced by the judgement of the International Military Tribunal at Nuremberg. In rejecting the defendant's plea that Germany had invaded Norway as an act of self-defence to forestall an imminent allied landing in Norway, the Tribunal applied the principles of the Caroline case, observing that

> . . . preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defence, leaving no choice of means and no moment for deliberation.[54]

These requirements clearly underline the exceptional character of self-defence. The right operates to protect essential rights from impending irreparable harm in circumstances where there are no alternative means of protection. The requirements that the need for self-defence must be instant means, first, that preventive measures against remote future contingencies are not covered by self-defence. This is why Germany's anticipation of an allied invasion of Norway could not properly be justified as an act of self-defence.[55] Secondly, self-defence does not cover repressive or retaliatory measures against past injuries, but only preventive measures against present or impending danger. It is this feature of self-defence which distinguishes

it from other aspects of self-help, for example reprisals, which may no longer be permissible.[56] In practice, however, it may not always be possible to draw a clear-cut distinction between defensive and repressive or retaliatory measures. A state may possibly legitimately resort to what may be characterized as defensive retaliation against "past" offences or injuries which are likely to be repeated in the immediate future.[57] In such a situation it is perhaps better to regard the committed offences and the anticipated ones as constituting one continuous offence. The element of emergency will still be there if in the period between one offence and another there is no prospect of effectively utilizing other less drastic measures.

It should not, however, be supposed that only the necessity of the moment justifies the use of force in self-defence. Measures of force are strictly said to fall under the rubric of self-defence only when they are taken against a party who is guilty of delictual conduct toward the party resorting to force. It is in fact this pre-condition of delictual conduct which many modern writers view as distinguishing self-defence from the controversial concepts of "self-preservation" and "necessity".[58] Thus, in his comments on the defendants' plea of self-defence in the Nuremberg trials,[59] Schwarzenberger notes that the plea was in law misconceived.

> Actually, the plea was not one of self-defence, but of necessity. Assuming but not granting that the German

> invasion of Norway had been provoked by an imminent allied invasion, this would not have given Germany any right to invade Norway. Measures of self-defence may only be taken against a subject of international law to whom illegal acts or omissions are imputable, but not against an innocent third party. Necessity is not so narrowly confined. It does not, however, amount to a ground of justification. At most, it constitutes an excuse.[60]

It may indeed be necessary to mention at this point that in strict legal terminology, self-defence should perhaps be characterized as a "privilege" or "liberty" rather than a "right".[61] It is a "privilege" which "justifies conduct otherwise illegal which is necessary for the protection of certain rights Strictu Sensu".[62] These rights Strictu Sensu necessarily imply correlative duties or obligations; and it is the breach of such duties - the pre-condition of delectual conduct - which brings into operation the "privilege" or "liberty" to act in self-defence. "The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence."[63] Yet the measures of self-defence must be aimed at the protection of the threatened rights and must be confined to that purpose.[64] The fact that self-defence presupposes delictual conduct on the part of the party against whom it is exercised does not mean that the measures of force should take on a punitive character.

It remains to restate these conditions in terms of the right of protection of nationals abroad. It would appear that for a state to be justified to use force in the protection of its nationals within foreign borders, there must be

(I) an imminent threat of injury to nationals,

(II) failure or inability on the part of the local sovereign to protect the nationals,

and

(III) the measures of force taken must be confined to the object of protecting the nationals.[65]

The requirement of an imminent threat of injury to nationals, complemented as it is by the requirement that the measures taken must strictly be confined to the object of protecting the nationals, precludes punitive or retributive action. The right of self-defence in the protection of nationals abroad is not a substitute for the normal procedures of international claims; the right has no place in a case where the injury to nationals has already come to pass and nothing more could be done to prevent or minimize it. Thus the right of self-defence in the protection of nationals abroad should be seen to be in a significant way different from the pre-1945 "right of intervention" to protect lives and property, which latter right was not so narrowly defined.[66]

Even where the injury to nationals is impending, action in self-defence is precluded if the threatening injury is theoretically remediable either by diplomatic interposition or by the presentation of an international claim on behalf of the nationals.[67] This, of course, arises from the exceptional character of self-defence. Unlike the broader notion of self-help, self-defence is not available to remedy just any wrong or injury suffered by a state or its nationals. The right to employ force in a foreign country in the protection of nationals is exclusable only in a situation of grave irreparable

injury impending to nationals. In the words of Fitzmaurice:

> Loss of life and certain kinds of grave physical injury are irremediable. No subsequent action, redress or compensation can bring the dead to life or restore their limbs to the maimed. There is no remedy except prevention. In this lies the ultimate justification for intervention of this kind. Its object is protective.[68]

Indeed, it is largely due to this condition of "irreparability" that there are doubts as to whether threatened damage to property of nationals would justify preventive action within the territory of another state.[69]

These rigorous requirements for the exercise of the right of self-defence in the protection of nationals are a measure of the importance which the law attaches to the sovereignty and exclusive character of the jurisdiction of a state within its territory.[70] Under normal circumstances, a state is precluded from exercising its physical protection over its nationals within foreign borders. Subject to the "right" of "intervention" or more properly interposition by diplomats, the task of protecting such nationals primarily falls upon the territorial sovereign.[71] Accordingly, another condition for the exercise of the right of protection of nationals is failure or inability on the part of the territorial sovereign to afford protection to the endangered nationals. The exclusive jurisdiction which a state enjoys over its territory has a double aspect. It not only precludes other states from exercising the prerogatives of sovereignty over the territory of the state, but it also gives rise to corollary obligations upon the local soveriegn towards other states. One of the well-

recognized of such obligations is the duty to afford foreign nationals some measure of protection.[72] A state may indeed be held internationally responsible for injuries suffered by aliens as a result of failure on its part to fulfil the duty of protection.[73] The obligation to afford alien nationals protection against injury is not absolute. It is often stated that by admitting foreign nationals (or property) within its jurisdiction, a state does not thereby become an insurer of foreign interests.[74] As a general rule, it can perhaps be stated that "a state is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that state and causes an injury to an alien."[75] It would appear clear that a state would be held internationally responsible for injurious acts of its own officials or organs.[76] On the other hand, a state cannot be held responsible for every act of private individuals. To take a specific instance, the Iranian Government could not, without move, have been held responsible for the attack upon the United States Embassy in Tehran on November 4, 1979.[77] When the militants executed the attack, they had no form of official status as recognized agents or organs of the Iranian State.[78]

> Their conduct in mounting the attack, overruling the embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that state on that basis. Their conduct might be considered as itself imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf on (sic) the state, having been charged by some competent organ of the Iranian State of carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between.

the militants and any competent organ of the state.[79] A state would, however, be held responsible if the injury caused by private individuals "is accompanied by circumstances which can be regarded as in some way, by complicity before or condonation after the event, making the state itself a party to the injurious act of the individual."[80] This would be the case, for example, where a state fails to exercise "due diligence" in safeguarding the lives or interests of aliens within its jurisdiction against unlawful activities.[81] A state may, for example, be regarded as having failed to exercise "due diligence" if it fails to take preventive or deterrent measures against possible or recurrent unlawful and injurious activities. It is often said that the responsibility is based on the failure of the territorial sovereign to conform to minimum standards of international law, in the words of Elihu Root, to "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form part of international law."[82] The case of the American hostages in Iran went beyond mere failure on the part of the local sovereign to prevent or punish unlawful conduct injurious to foreign nationals.[83] The Iranian Government subsequently gave official approval to the attack[84] and in fact participated in the detention of the American hostages and in pressing the demands that had been initiated by the militants against the United States.[85]

The use of force in the protection of nationals abroad and the institution of State Responsibility for Injuries to Aliens

can thus be seen as complementary institutions, one permitting the state of nationality to take action on foreign territory for the purpose of preventing threatened injury, and the other operating to enable the state of nationality to obtain remedies from the local sovereign for injuries that have already been sustained by nationals. The two are not, however, substitutes for each other.

Responsibility for injuries to aliens on the part of the local sovereign and the right of the state of nationality to use force in the protection of its nationals within foreign territory are not co-extensive. Not all injuries for which the local sovereign would be held responsible justify the resort to forcible protection by the state of nationality. It is accordingly not very accurate to say, as Hyde does, that

> . . . the price of inviolability of any territory is the maintenance of justice therein. Accordingly, when that price is not paid in relation to foreign life and property, the landing of forces for their protection is to be anticipated.[86]

The right of self-defence in the protection of nationals abroad is available only in the case of a threat of "irresponsible" injury to the nationals and not just in every case where the territorial sovereign has failed to pay the "price of inviolability of territory." Some writers hold that a case of forcible protection of nationals abroad may arise even when the threatening injury to the nationals could not legally be attributed to the local sovereign in the sense that the local sovereign could not be held liable in an international claim. Thus Bowett states as follows:

> Nevertheless, it is conceivable that even where "due diligence" has been exercised by the territorial state, there may be a threat to the lives and property of these aliens originating from groups of individuals for which the territorial state can bear no responsibility. This is not to suggest that there cannot be responsibility for "mob violence" but only that it is feasible for this to occur in circumstances where the territorial state has nevertheless acted with due diligence.[87]

This view is inevitably subject to an important technical objection. One of the distinguishing aspects of self-defence is that it is exercised against a party who is guilty of delictual conduct towards the party resorting to self-defence. Measures of force taken against an innocent third party, against a party to whom no illegal acts or omissions are ascribable, cannot be justified on the basis of self-defence.[88] On the basis of this refinement of the right of self-defence, the use of force in the protection of nationals in a foreign territory whose sovereign cannot legally be held responsible for the threatened injury does not appear to readily fall under the head of self-defence. From the viewpoint of the individuals or mobs responsible for the situation endangering the lives of the nationals, this objection does not apply. But the important viewpoint is not that of an irresponsible mob, but of the sovereign whose territory is violated. And from this viewpoint, the objection would appear to pose a serious theoretical obstacle. Thus Bowett concedes that

> . . . in such a case the right of the protecting state arises from the exigencies of the situation, not from the breach of any obligation, and is for this reason, more properly classed as an exercise of the "right" or more strictly the qualified privilege of necessity rather than the right of self-defence.[89]

Ross, while appearing to agree with this analysis, maintains that "it seems reasonable to treat all cases of attack even on the part of private individuals according to the principle of self-defence".[90] Indeed, the essence of the use of force, irrespective of whether or not the local authorities are at fault, is the protection of nationals and not the punishment of a breach of an international obligation. The measures of protection must strictly be confined to that objective. As such the requirement of fault would appear to have little significance. Yet the requirement constitutes an important aspect of the principle of self-defence. And if the right of protection of nationals abroad cannot, in some of its aspects, conform to the principle of self-defence, such nonconformity must be registered as a possible difficulty involved in the identification of the right of protection of nationals with the principle of self-defence.

The requirement that there must be failure or inability on the part of the local sovereign to protect the nationals is clearly an aspect of the exercise of the right of self-defence, namely, that there must be a "necessity of self-defence . . . leaving no choice of means." Before a state could resort to force in the protection of its nationals within foreign territory,

> . . . every effort must be made to get the local government to intervene effectively and, failing that, to obtain its permission for independent action; equally clearly every effort must be made to get the United Nations to act.[91]

The requirement that permission for independent action must

first be sought from the local sovereign can only be insisted on where there are no open signs of hostility on the part of the local sovereign towards the endangered aliens. Where there are clear indications of such hostility, for example in the Tehran case,[92] a request for permission to land may only alert the local authorities to the eventual measures of defence, and further jeopardize the lives of nationals. A request for permission to land would likely remove the element of surprise that may be crucial to the safe evacuation of the endangered lives. The same is true with the requirement that every effort must be made to get the United Nations to act. Action by that organization is likely to involve a time lag that may prove fatal. Moreover, with the existing political set-up of the United Nations, and the "indiscriminate" use of the veto by the permanent members of the Security Council, action by the United Nations to protect nationals abroad no longer appears as a practical possibility.[93]

The right of self-defence in the protection of nationals abroad may also further be limited by the fact that it may apply only to the protection of a state's own nationals.[94] It is the bond of nationality that provides the basis for the identification of the protection of nationals abroad with the right of self-defence.

> In the absence of this nexus of nationality or citizenship, it is difficult to see how protection can be brought within the concept of self-defence, for it is because of their nationality that persons can be regarded as part of the state and, therefore, their protection be undertaken by the state as self-protection.[95]

It will be seen in the final chapter of this study that as long as the basis for the identification of the measures of protection with the right of self-defence has been established, states resorting to force have not hesitated to extend the measures of protection to aliens of other nationalities.[96] Still, the resort to force exclusively for the purpose of protecting foreign nationals within foreign territory may not be justified on the basis of self-defence. It has been suggested that the doctrine of collective self-defence provides a legal rationale for such use of force.[97] The doctrine of collective self-defence is a complex one, and there are at present several competing theories as to the nature or basis of the doctrine.[98] Under one view, for example, the right of collective self-defence requires that each of the parties participating in the defensive measures must individually have a right which it could exercise by resort to individual self-defence.[99] According to this view, the concept of collective self-defence does not apply where A violates the legally protected interests of State B only, but C joins B in defending those interests. As put by Professor Stone,

> . . . under general international law, a state has no right of "self-defence" in respect of an armed attack upon a third state. The very notion of collective self-defence seems contradictory, except as resorted to by two or more victims simultaneously attacked by the same power.[100]

Thus, where nationals of State B are threatened in State A, C's use of force in State A to protect B's nationals cannot be based on the concept of collective self-defence, but on the

"concept of a 'duty' to maintain international peace and redress the violated norm, or an interest in the maintenance of international peace and security."[101] The suggestion that the use of force in the protection of foreign nationals in a foreign country can be based on the doctrine of collective self-defence has been supported by the argument that the whole world community has an interest in the protection of nationals (of any country) who are threatened by illegal activities.

> The fact that a particular state does not have the military means to defend its nationals abroad in a situation where another state is actively collaborating with terrorists should not preclude the state from calling on other states with the necessary military capabilities for assistance. As McDougal and Feliciano[102] have suggested, in such a situation each member of the world community "in effect asserts, singly and in combination, defense of the new and more comprehensive 'self'."[103]

Indeed, this appears to be tantamount to equating self-defence with police measures for maintaining international peace and security, and for redressing international wrongs. It is submitted that whether or not the resort to force in the protection of foreigners in a foreign country is legally admissible, must largely depend on the viability of the concept of "humanitarian intervention" as a legal justification for the use of force by states in their international relations. The link between the use of force in the protection of foreigners within a foreign country and the doctrine of collective self-defence appears to be somewhat tenuous.[104] The concept of humanitarian intervention and its relation to

the use of force in the protection of nationals abroad is examined in the next chapter.

NOTES: CHAPTER 3

[1]See supra. Chapt. 1, n. 6.

[2]The controversy is part and parcel of modern theoretical attempts to delimit the scope of the right of self-defence. These attempts are to a large extent, a measure of the increasing importance of "self-defence" as a juridical concept. While the norm against the use of force, against "intervention", or against "aggression", renders doubtful many traditional justifications for the use of force by states, self-defence continues to provide a universally recognized justification for such use of force. This has entailed a greater need to identify forms of coercion which properly constitute the exercise of the right of self-defence. Such a process of identification has naturally become more or less synonymous with the very process of distinguishing between the legal and the illegal resort to coercion. The question whether or not the use of force in the protection of nationals abroad forms an element of the right of self-defence can accordingly no longer remain a matter of indifference. An affirmative or negative answer to the question more or less amounts to admitting or denying the legality of such use of force.

[3]See Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), p. 220; R.T. Bohan, "The Dominican Republic: Intervention or Self-Defence", 60 A.J.I.L. (1966), p. 64; Van Panhuys, The Role of Nationality in International Law (1959), p. 114; J.E.S. Fawcett, "Intervention in International Law: A Study of Recent Cases", 103 R.C. (II, 1961), p. 347 at 404; Brownlie, op. cit., pp. 255-56; 289-301; see also Phillip Jessup, A Modern Law of Nations (1968), pp. 169-72.

[4]The authorities who support this interpretation appear to assume that their understanding of the law applies equally to states that are not members of the U.N. It is possible to argue that Article 51 of the Charter as read together with Article 2(4) constitutes an exception to the maxim Pacta tertiis nec nocent nec prosunt (treaties are neither of benefit nor of detriment to third parties). General multilateral treaties to which the overwhelming majority of states are contracting parties and which aim at an international order of the world, such as the Charter of the United Nations, are widely regarded as imposing duties even upon third parties. [See Kelsen-Tucker, Principles of International Law (1966), p. 486; see also Art. 2(6) of the Charter, and commentary on the article by Goodrich, Hambro and

Simons, Charter of the United Nations (1969), p. 58]. Membership to the U.N. is almost universal. [There are 154 members St. Vincent and the Grenadines was admitted as the 154th member]. Article 51 may also be thought to represent prevailing customary international law. [See Brownlie, op. cit., p. 265].

[5]See discussion especially of Art. 2(4) of the Charter in Chapt. 2 above.

[6]See H. Kelsen, Recent Trends in the Law of the United Nations (1951), p. 914.

[7]Although Fitzmaurice, speaking on behalf of the British Government, did not refer specifically to the words "armed attack", he more or less expressed this view in his arguments before the Sixth Committee of the U.N. in 1952. See nn. 83-4 of Chapt. 2 above.

[8]Vattel, Le Droit des Gens Ou Principes de la Loi Naturelle Bk. I, Cap. II, p. 136 (Carnegie tr. 1916), see also Borchard, Diplomatic Protection of Citizens Abroad (1915), p. 31.

[9]See discussion of the Case in Chapt. 5, n. 72 below. Also see L.C. Green, "The Tehran Embassy Incident - Legal Aspects", 19 Archiv. des Volkerrecht (1980), pp. 1-22. Note: In its report to the Security Council on 25 April, 1980, "pursuant to Article 51 of the Charter of the United Nations", the United States maintained that its attempted rescue operation in Iran had been carried "in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain victims of the Iranian armed attack on our Embassy" cited by the I.C.J. in the Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. 1980, p. 3, para. 32.

[10]See L.C. Green, "Armed Conflict, War, and Self-Defence", 6 Archiv des Volkerrechts (1956-57), p. 386, at pp. 432-37; also Report of the Forty-Sixth Conference of the International Law Association 1958, pp. 516-18; Bowett, op. cit., p. 182, seq.; C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 R.C. (II, 1952), p. 455 at pp. 496-99; also Brierly-Waldock, The Law of Nations (1963) p. 417; George Schwarzenberger "The Fundamental Principles of International Law", 87 R.C. (I, 1955), p. 195 at pp. 330-339; Gerald Fitzmaurice, "The General Principles of International Law Considered From the Viewpoint of the Rule of Law" 92 R.C. (II, 1957), p. 5 at pp. 171-72; Myers McDougal, "The Soviet-Cuban Quarantine and Self-Defence", 57 A.J.I.L. (1963), p. 597; see also arguments of the Lord Chancellor Viscount Kilmuir in

the House of Lords in connection with the 1956 Suez Crisis. Hansard, H.L., Vol. 199, Cols. 1348 59, Nov. 1, 1956. For the discussion of the Suez Case, see Chapt 5 below.

[11]See citations in n. 10 of this Chapt.

[12]See discussion of the League Covenant and the Pact of Paris in Chapt. 1 nn. 69-76, above.

[13]Proceedings of the American Society of International Law (1928), p. 143.

[14]UNCIO, Vol. 6, p. 459.

[15]The League of Nations Covenant and the Pact of Paris.

[16]UNCIO, Vol. 12, pp. 682-87.

[17]UNCIO, Vol. 12, pp. 662; 766, 680-82.

[18]The provision was in the end transferred from Chapter VIII dealing with regional arrangements to Chapter VII concerned with "Action with Respect to Threats to Peace, Breaches of the Peace and Acts of Aggression". Schwarzenberger significantly notes that the purpose of the transfer was "to put stronger emphasis on the fundamental character of . . . self-defence, and not on the generalization of the limitations which had been inserted with an eye on regional arrangements". 87 R.C., p. 338.

[19]See supra, Chapt. 2, text to nn. 2-29.

[20]Supra, Chapt. 2, text to nn. 2-29.

[21]See Bowett, op. cit., p. 185.

[22]See text to nn. 53-64.

[23]Bowett, op. cit., p. 152, also pp. 185-6.

[24]See supra, Chapt. I, n. 7 and text.

[25]c.f. Brownlie, op. cit., pp. 25-80, esp. at pp. 255-6.

[26]See supra, Chapt. I, n. 51 and text.

[27]See supra, Chapt. 2, text to n. 2.

[28]Judgement, Cmmnd. 6964, p. 30.

[29]c.f. Brownlie, op. cit., pp. 251-65.

[30]See Waldock, 81 R.C., p. 500; The Law of Nations, p. 421; Schwarzenberger, 87 R.C., pp. 338-39; also Report of the 48th Conference of the Int. L. Soc. 1958, p. 573; Bowett, op. cit., pp. 8, 29-114, 270; G. Fitzmaurice, 92 R.C., p. 171.

[31]I.C.J. Rep. 1949, p. 4. See observations by Schwarzenberger, Waldock, and Fitzmaurice (n. 20 of this Chapt.).

[32]See Brownlie, op. cit., pp. 277, 283-89; Bowett, op. cit., p. 190; McDougal and Feliciano, Law and Minimum World Public Order (1961), p. 226.

[33]I.C.J. Rep. 1949, pp. 29-30.

[34]I.C.J. Rep. 1949, p. 30.

[35]I.C.J. Rep. 1949, p. 31.

[36]I.C.J. Rep. 1949, pp. 34-35.

[37]The justification of self-defence was specifically raised only with respect to the mine-sweeping operation of 12-13 Nov. 1946. See Corfu Channel Case - Pleadings, Oral Arguments and Documents (1950) I.C.J., Vol. 2, pp. 280-84; Vol. 3, pp. 293-97; Vol. 4, pp. 572-92.

[38]See n. 32 of this Chapt.

[39]See text to n. 34 of this Chapt.

[40]See Fitzmaurice, 92 R.C., p. 172.

[41]See n. 35 of this Chapt.

[42]See Schwarzenberger, Report of the 48th Conf. Int. Law Soc., pp. 572-73.

[43]For the attitude of the Court to the U.S. attempted

rescue operation in Iran, see infra. Chapt. 5, nn. 101-109. Chapt. 5 also contains a review of state practice relevant to the foregoing discussion of self-defence.

[44]See Bowett, op. cit., p. 9; Kelsen-Tucker, Principles of International Law (1966) p. 73; Schwarzenberger, 87 R.C., p. 333.

[45]These will be discussed later in this chapter. Text to nn. 53-64.

[46]See discussion in Chapt. I, text to nn. 51-8. See also the North American Dredging Case, Chapt. I, n. 58.

[47]See Bowett, op. cit., p. 8.

[48]See Bowett, op. cit., pp. 29-114, 270. Bowett's list of rights capable of protection by self-defence includes the right of territorial integrity (this is perhaps the most obvious of these rights), the right of political independence (although readily accepted as an essential right, it does not appear very easy to determine, juridically, whether or not there has been a sufficient infringement of the right to warrant the resort to force), the right of protection of nationals abroad (this forms the subject of this study), and certain economic rights (these rights although obviously essential, may not be easy to define). Britain and France invoked them as part of their justification for the invasion of the Suez, Egypt, see Chapt. 5 n. 2 below; in justifying India's use of force in Pakistan, the Indian representative claimed in the Security Council, Dec. 1971, that as a result of Pakistan's mistreatment of its people, ten million Pakistanis had fled to India, subjecting India to intolerable social, financial and administrative pressures. This, claimed the Indian representative, constituted a form of aggression justifying India's use of force. See U.N. Yearbook 1971, p. 145. It may be noted that this argument by India was, in a way, distinct from the argument of humanitarian intervention which latter argument was also employed by India. See infra. Chapt. 4 n. 58 text thereto.

[49]These include, Waldock, 81 R.C., p. 464, also Brierly's Law of Nations (1963), pp. 423-28; Fitzmaurice, 92 R.C. (1957), pp. 172-74; Bowett, op. cit., pp. 87-105; also "The Use of Force in the the Protection of Nationals Abroad", 43 Grotius Society, 1959, p. 111; H. Kelsen, "Collective Security Under International Law", U.S. Naval War College (Int. Studies) 1954, p. 62 (1956). [It is interesting to note that Kelsen holds this view while he generally tends to agree with the restrictive interpretation of Article 51 of the Charter]; Green, 6 Israel Yb. Human Rights, 1976, p. 312 at pp. 319-20, also 24 Chitty's

Law Journal (1976), p. 217; Charles Fenwick, "The Dominican Republic" Intervention of Self-Defence", 60 A.J.I.L. (1966), p. 64; John Murphy, "State Self-Help and Problems of Public International Law", in Evans and Murphy, Legal Aspects of International Terrorism (1978), p. 553, at 556, 559, 562; O'Connell, International Law (1970), p. 303.

[50]See for example, the treatment of the subject by Bowett, and Green's discussion of the Entebbe rescue operation [n. 49 of this Chapt.].

[51]See Bowett, and Waldock (n. 49 of this Chapt.). See also Brownlie, op. cit., p. 299.

[52]See British and Foreign State Papers, Vol. 30, p. 193, Moore, 2 Digest, p. 412.

[53]Of course the principles had little utility in the context of the customary international law precailing during Webster's period. Only later, after international law had evolved positive principles against the use of force could self-defence so framed be meaningful.

[54]Judgement of the International Military Tribunal at Nuremberg. 41 A.J.I.L. (1967), p. 172, at p. 205.

[55]See n. 54 of this Chapt.

[56]At least theoretically, the legal regime of the Charter of the United Nations may be said to leave little room for legitimate forcible reprisals. The obligation under Article 2(4) of the Charter, coupled with undertaking under Article 2(3) to settle all international disputes by peaceful means, clearly throws much doubt on the legitimacy of forcible reprisals. See Bowett, op. cit., p. 11; Schwarzenberger, 87 R.C., p. 343; Waldock, 81 R.C., p. 464.

[57]See Schwarzenberger, 87 R.C., p. 333.

[58]See e.g. Kelsen-Tucker, op. cit., p. 58; Bowett, op. cit., p. 11; Schwarzenberger, 2 International Law (1968), p. 30. See also the position under English Common Law The Queen v. Dudley and Stevens (1884), 14 Q.B. 273.

[59]See n. 54 of this Chapt.

[60]Ibid. The same observation may also apply to the attack by the British Royal Navy on the German ship Altmark in Feb.

1940. The Altmark was attempting to escape to German ports with about 300 British prisoners. The attack, which resulted in the release of the prisoners took place in neutral Norwegian waters. No prior authority had been obtained from the Norwegian Government. On the other hand, however, the British Government appears to have believed that Norway was delinquent in the handling of the incident. The British Prime Minister, Neville Chamberlain, claimed in the House of Commons that Norwegian authorities had failed to carry out proper investigation of the character of the Altmark, that Norway's "indeferent" handling of the case was "inconsistent with the active and impartial exercise of the duty of a neutral towards (the British) as belligerents". Parl. Deb. Vol. 357, pp. 1161-63. See however, Borchard, "Was Norway Delinquent in the Case of the Altmark?" 34 A.J.I.L. (1940) p. 289.

[61]For a close examination of these terms, see W.N. Hohfeld, Fundamental Legal Conceptions (1913).

[62]See Bowett, op. cit., pp. 8-9.

[63]Ibid.

[64]" . . . since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it". U.S. Sec. of State, Webster. See n. 53 of this Chapt.

[65]See Waldock, 81 R.C., p. 467.

[66]See Chapt. 1 above, text to nn. 49-50.

[67]See Bowett, op. cit., p. 88.

[68]92 R.C., p. 173.

[69]During the Suez Crisis 1956, some advocates of the Anglo-French intervention justified the intervention on the basis of protection, of valuable installations in the Suez area. (See discussion in Chapt. 5 n. 2 below). Bowett expresses the opinion that it is all a question of reasonableness or proportionality; if the threatened danger to property is so extensive that it could not probably be redressed by a claim, the use of force to prevent such damage may properly be considered to constitute self-defence. (Bowett, op. cit., pp. 100-103). Bowett, however, would still appear to entertain some doubts on the issue (ibid.).

[70]Supra. Chapt. 2, nn. 76-80.

[71]See Fitzmaurice, 92 R.C., p. 173; Waldock, 81 R.C., p. 427.

[72]See Barcelona Traction, Light and Power Case (Belgium v. Spain), I.C.J. Rep. (1970), p. 3. See also paras. 33 and 87 of the Judgement; and Thomas and Thomas The Dominican Crisis 1965, 9 Hammarskjold Forum (1967), p. 11; Brierly-Waldock, op. cit., p. 276; Kelsen-Tucker, op. cit., p. 366; Green, 6 Israel Yb. Human Rights, (1976), p. 320.

[73]Important judicial pronouncements on state responsibility may be found in the Reports of International Arbitral Awards (R.I.A.A.) series. See e.g. Youman's Claim (1926), 4 I.R.A.A., p. 110; Neer Claim (1926) 4 R.I.A.A., p. 60; Francisco Mallen's Claim (1927), 4 R.I.A.A., p. 173; Caire Claim (1929), 5 R.I.A.A. p. 516. See also Chorzow Factory Case (Indemity) (Merits) - Germany v. Poland (1928), P.C.I.J. Rep. Series A, No. 17 and the recent judgement of the I.C.J. in the Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. (1980), p. 3. Literature on the subject is vast. See e.g. Garcia - Amador, Louis B. Sohn, R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974); and Report of the I.L.C. on its 31st Sess. (1979), U.N. Doc. A/34/10 (1979); L.B. Sohn and T. Buergenthal, International Protection of Human Rights (1973), cap. II, p. 23, particularly pp. 87-97 containing a valuable bibliography; Edwin Borchard, Diplomatic Protection of Citizens Abroad (1915); F. Dunn, The Protection of Citizens Abroad (1970); Whiteman, 8 Digest, cap. XXI; C.F, Amerasinghe, State Responsibility for Injuries to Aliens (1967); see also McDougal, Laswell, and Chen, "The Protection of Aliens from Discrimination and World Public Order: Responsibility Conjoined with Human Rights", 70 A.J.I.L. (1976), p. 432; R. Lillich, "Diplomatic Protection of Nationals Abroad: Elementary Principles of International Law" 69 A.J.I.L. (1975), p. 359; A.H. Roth, The Minimum Standard of International Law Applied to Aliens (1949).

[74]Barcelona Traction Case, see n. 72 of this Chapt.

[75]See Art. I Draft Convention on International Responsibility of States for Injuries to Aliens, submitted to the International Law Commission by F.V. Garcia-Amador, see Recent Codification (n. 73 above), p. 143, and accompanying explanatory note; American Law Institute Restatement, State Responsibility for Injuries to Aliens: Diplomatic Protection and International Claims 5, 164(1); see also Whiteman, 8 Digest, cap. XXIV.

[76]See Brierly-Waldock, op. cit., p. 289.

[77]See infra. Chapt. 5, n. 92. It may also be noted that apart from the general obligation to protect aliens, Iran was also bound by special obligations imposed both by customary law and specific treaties (Vienna Convention on Diplomatic and Consular Relations, 1961 and the Optional Protocol to the Convention, 1963) relating to diplomats and consular staff (see infra Chapt. 5, p. 117). These special obligations were even more obvious in this case since the Iranian authorities knew about the danger to the U.S. Embassy.

[78]See Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Rep. 1980, p. 3, para. 57. See also 19 Int. L.M. (1980) p. 553 at p. 566.

[79]Ibid.

[80]Brierly-Waldock, op. cit., p. 284. This is one basis upon which the seizure of the U.S. Embassy in Tehran became imputable to the Iranian state. (See n. 83 of this Chapt. below).

[81]See Art. 13 of the Draft Convention on International Responsibility of States for Injuries to Aliens (see n. 73).

[82]Address to the American Society of International Law on the 4th Annual Meeting, April 28, 1910, Washington. See 4 A.J.I.L. (1910), p. 517 at 521. See also McDougal, Lasswell, and Chen, op. cit., p. 432.

[83]See Case Concerning United States Diplomatic and Consular Staff in Tehran, paras. 63-74; 19 Int. L.M., pp. 566-68.

[84]See para. 73 of the I.C.J. judgement.

[85]See Chapt. 5 text to n. 119 for further discussion.

[86]International Law, Vol. I, (1945), p. 649.

[87]Op. cit., p. 89. See also Murphy, op. cit., p. 562.

[88]See n. 58 of this Chapt. It is possible that, despite "due diligence", a state may still be unable to protect aliens. In such a case, there is perhaps a duty on the part of the local sovereign to invite assistance, especially from the states whose nationals are involved. Failure to do so may well be viewed as

culpable negligence; although it is also possible that a state may have strong reasons for not wishing to have foreign troops on its soil.

[89]Op. cit., 89-90.

[90]A Textbook of International Law (1947), p. 244, see also Thomas and Thomas, The Dominican Crisis 1965, pp. 15-16, Jessup, A Modern Law of Nations, pp. 163-64.

[91]Brierly-Waldock, op. cit., pp. 89-90.

[92]See Chapt. 5, n. 92.

[93]The dismal failure of the Organization to effectively act during the American hostage crisis in Iran, poignantly illustrates this point.

[94]See Thomas and Thomas, The Dominican Crisis 1965, pp. 18-19; Bowett, op. cit., pp. 94-6; Lillich, "Self-Help by States in the Protection of Human Rights", 53 Iowa L.R., p. 337.

[95]Bowett, op. cit., p. 95. See also Chapt. I, n.I. In the Panevezys-Saldutiskis Ry Case, the Permanent Court of International Justice stated that:

> In taking up the case of its national, by resorting to diplomatic action or international juridical proceedings on his behalf, a state is in reality asserting its own right.
> . . . This right is necessarily limited to intervention on behalf of its own nationals, because, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection. . . .

P.C.I.J. Rep. Ser. A/B No. 76, at p. 16. See also the opinion of the I.C.J. in the Notlebohm Case (Liechtenstein v. Guatemala), I.C.J. Rep. 1955, p. 4 esp. at p. 24.

[96]See for example, the Congo, Dominican, and Entebbe Cases examined below, Chapt. 5, nn. 24, 41 and 74 respectively.

[97]See Murphy, op. cit., pp. 561-62.

[98]See Bowett, op. cit., p. 200; McDougal and Feliciano, Law and Minimum World Public Order (1961), pp. 244-51; J. Stone, Legal Controls of International Conflict (1954), p. 245; Waldock, 81 R.C., pp. 503-505; Goodhart, "The North Atlantic Treaty of 1949", 79 R.C. (II, 1951), p. 183; Kelson, The Law of the United

Nations (1950) p. 792. See also Whiteman, 5 Digest, s. 26, p. 1044 seq.

[99]Bowett, op. cit., pp. 206-207; Stone, op. cit., p. 245; Kelsen, op. cit., p. 792.

[100]Ibid. See also Bowett, op. cit., p. 206.

[101]Bowett, op. cit., pp. 206-207.

[102]Op. cit., pp. 244-51.

[103]Murphy, op. cit., 561.

[104]It may be observed that the protection of nationals abroad may not even fit in the designs of most mutual security pacts such as Nato or the O.A.S. Charter, in which the casus foederis tends to be defined in areal terms. Self-defence tends to be viewed in terms of protecting the territorial integrity and political independence of the states involved see e.g. Arts. 5 and 25 of the Charter of the O.A.S., or the Brussels Pact, 1948, Art. 4 and not simply in terms of protection of legal interests in general.

CHAPTER 4

THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD AND THE CONCEPT OF HUMANITARIAN INTERVENTION

The identification of the use of force in the protection of nationals abroad with the doctrine of humanitarian intervention is a modern phenomenon.[1] During the nineteenth and early twentieth centuries, humanitarian intervention was almost exclusively associated with the protection of aliens, especially against their states of nationality.[2] The protection of a state's own nationals was generally regarded as a separate category which, through the bond of nationality, was readily admitted as a form of "self-defence", or "self-preservation", or "self-protection".[3] Within the framework of traditional theory, humanitarian intervention was a somewhat anomalous category. The concept of nationality has played an important role in the evolution of the law governing the protection of nationals abroad largely because of the failure of traditional theory to fully recognize an individual person as a subject of international law. International law has for a long time been held to be a law between sovereign states alone. As such, it could confer neither rights nor obligations on individual persons.[4] Where individuals have appeared to derive protection under international law, the traditional view has been that such protection is enjoyed, not by virtue of any right which international law gives to the individual, but by reason

of a right appertaining to the state of which the individual is a national.[5] The international protection of the interests of the individual could be achieved only by identifying those interests with the interests of the state of nationality.[6] In the typical case of humanitarian intervention, the basis for the identification of the interests or safety of the individual persons with those of the intervening state could not be found in the bond of nationality. It is due to this anomalous character of humanitarian intervention that, whereas the use of force in the protection of nationals abroad was readily admitted both in the theory and practice of international law during the nineteenth and early twentieth centuries,[7] the legality of humanitarian intervention was often questioned by jurists.[8]

In his De Jure Belli Ac Pacis Tres, Grotius stated that:

> Kings, and those who possess rights equal to those of kings have the right of demanding punishment not only on account of injuries which do not directly affect them, but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . The contrary view is held by Victoria, Vazquez, Azor, Molina and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either in person or his estate, or that he should have jurisdiction over him who is attached. For they claim that the power of punishing is the proper effect of civil jurisdiction, while we hold that it also is derived from the law of nature.[9]

Grotius had touched on the very issue that was to prove troublesome to future writers, namely, the missing link between the injury and the "avenger" in a case where a king or ruler wages a war to punish injuries suffered neither by himself nor by his subjects. Even today, the difficulty presented by this

missing link continues to bedevil the law of international claims.[10] Grotius clearly appears to have found the missing link in the universality of the law of nature. A violation of this law established, as it were, the necessary locus standi of any sovereign to take action. It is worth noting that the standards set by Grotius for the exercise of this "right" of intervention were fairly high. It was not just a matter of violating the law of nature, but excessively violating that law. Vattel was less prepared to accept the "right of humanitarian intervention". He stressed that:

> No foreign state may inquire into the manner in which a sovereign rules, nor set itself up as a judge of his conduct, nor force him to make any change in his administration. If he burdens his subjects with taxes or treats them with severity it is for the nation to take action; no foreign state is called on to amend his conduct and to force him to follow a wiser and juster course.[11]

Vattel, however, appears to have admitted of an important exception to his principle of non-intervention. He wrote:

> But if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if by his insurpportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask it and . . . to give help to a brave people who are defending their liberties against an oppressor by force of arms is only part of justice and generosity.[12]

Vattel thus confined humanitarian intervention to cases where the subjects had actually taken up arms in revolt against their rulers, and had invited foreign states to intervene. Gross violations of human rights would not justify intervention as long as the victims of such violations remained subservient. The "right" of other states to intervene was derivative and

depended on the initiative of the oppressed subjects.[13]

With the decreasing influence of natural law thinking during the nineteenth and early twentieth centuries, the theoretical difficulties involved in admitting the "right of humanitarian intervention" were compounded. Some leading authorities flatly rejected the existence of any such "right". Hall, for instance, was of the view that:

> . . . international law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution, are acts which have nothing to do directly or indirectly with such relations.[14]

And later in the same passage, he viewed it as unfortunate "that publicists (had) not laid down broadly and unanimously that no intervention is legal except for a breach of law as between states (had) taken place."[15] Hall admitted that intervention "for the purpose of checking gross tyranny or helping a people to free itself (was) very commonly regarded without disfavour."[16] Such an intervention would be admissible if the whole body of civilized states concurred in authorizing it. Hall's argument was that collective intervention by a concert of states would be relatively free from abuse; abuse of the "right" was another reason for many a writer's reluctance to admit humanitarian intervention. Still, Hall insisted that "from the point of view of law, it (was) always to be remembered that states so intervening (were) going beyond their legal powers. Their excuse or justification (could) only be a moral one."[17] Halleck was of the view that "as an accessory to

others, this ground may be defensible, but as a substantive and solitary justification of intervention in the affairs of another country it can scarcely be admitted into the code of international law."[18] Some of the instances of humanitarian intervention during the nineteenth century tend to confirm Halleck's point. For example, the preamble to the Treaty of Pacification of Greece, which provided for the joint intervention of the Christian powers of France, Russia, and Great Britain against the Ottoman Porte in Greece,[19] did not refer only to the "necessity of putting an end to the sanguinary struggle" in Greece, but also to the necessity of "preventing the evils of every kind" which include "fresh impediments to the commerce of the states of Europe" and the "opportunity for acts of piracy which not only expose the subjects of the High Contracting Parties to grievous losses, but also render necessary measures which are burdensome for their observation and suppression."[20] It is very likely that the reference to "commerce" and "piracy" might have been made in the attempt to bring the three-power intervention within the rubric of self-preservation: that the intervening powers had themselves suffered injury as a result of the Greek insurrection.[21] The intervening powers may not have felt fully entitled to interfere in the Ottoman affairs without showing that they had themselves been adversely affected by the events in Greece.[22] So too, when the United States intervened in the Cuban revolution of 1895-98, it did not merely invoke "the cause of humanity to put an end to the barbarities" in Cuba, but

also invoked the duty owed by the United States Government to its citizens in Cuba and the need to put an end to "the very serious injury to the commerce, trade, and business of our people."[23]

Oppenheim, while doubting the legal admissibility of humanitarian intervention, admitted that such interventions were favourably viewed by states, in particular where they took the form of collective action.[24] Indeed, an almost invariable characteristic of the European interventions was that they were carried out either by a group of states in pursuance of detailed treaties or by one state with the sanction of other states.[25] Unilateral humanitarian intervention would appear to have been peculiar to the Western Hemisphere where the United States virtually enjoyed regional hegemony.

The numerous jurists who recognized the existence of the "right" of humanitarian intervention,[26] failed to clearly indicate or identify the theoretical legal foundations of the "right", and their formulations of the doctrine of humanitarian intervention took vague forms. Some jurists continued to appeal to the "fundamental laws of humanity" in the manner of Grotius. Humanitarian intervention was viewed as a vindication of these laws.[27] Many other writers searched for devices to serve in the place of the bond of nationality as a basis for identifying humanitarian intervention with the rubric of self-preservation. Wheaton, for example, attempted to identify humanitarian intervention with self-preservation by appealing to the somewhat extensive proposition that: "Whatever a nation

may lawfully defend for itself, it may defend for another if called upon to interpose."[28] Identity of religious faith between the intervening state and the protected individuals was seen by other writers as providing the necessary basis for the identification of humanitarian intervention with the "right" of self-preservation.[29] This view was no doubt influenced by the frequency of foreign interventions in cases of religious persecutions.[30] On the whole, writers failed to agree on any common formula of the "right" of humanitarian intervention.[31]

Humanitarian Intervention, Protection of Nationals, and Modern International Law

In retrospect, humanitarian intervention may be viewed as one possible means by which traditional international law protected human rights. Until recently, however, there has never been any clear conception of the role of international law with respect to human rights.[32] The development of international law in the field of human rights may ultimately lead to a clearer understanding of the concept of humanitarian intervention. The traditional conception of subjects of international law is facing a more direct[33] challenge from the emphasis which modern international law places on the realization and protection of human rights. Thus, the promotion and encouragement of "respect for human rights and for fundamental feedoms for all without distinction as to race, sex, language or religion" forms one of the express purposes of the United Nations Organization.[34] The Charter of the United

Nations contains many references to human rights.[35] The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December, 1948,[36] contains a fairly comprehensive enumeration of standards relating to civil, political, economic, social, and cultural rights. Though technically not a legally binding instrument, the Declaration may be viewed as an authoritative interpretation of the Charter by the General Assembly. It may also serve as a guide in the interpretation of other legally binding instruments whose preambles often make specific reference to it.[37] The Declaration has had much influence upon the subsequent development of the law, both within the sphere of the United Nations and at the regional level.[38] In view of these developments, international law may clearly not adequately be viewed as concerned merely with the relations between sovereign states. However, no general discussion of the subject of human rights is intended here. What only need be noted is the general direction of international law toward a clearer conception of the role of international law with regard to the protection of human rights. One result of this development has been the tendency to formulate the theory of humanitarian intervention specifically with reference to the protection of human rights. Thus, in Oppenheim's Eighth Edition, by Lauterpacht, humanitarian intervention is described in the following terms:

> There is a general agreement that by virtue of its personal and territorial supremacy, a state can treat its own nationals according to discretion. But there is a substantial body of opinion and practice in support of the view that there are limits to that discretion and that

> when a state renders itself guilty of cruelties against and persecutions of its nationals in such a way as to deny their fundamental human rights and shock the conscience of mankind, intervention in the interest of humanity is legally permissible.[39]

Brownlie characteristically defines humanitarian intervention as " . . . the threat or use of force by a state, a belligerent community or an international organization with the object of protecting human rights."[40] Another tendency that has accompanied the formulation of international law rules in terms of the protection of human rights has been to regard the protection of nationals abroad merely as an integral part of the international protection of human rights. Alienage is, in this respect, viewed as constituting just another potential area for discrimination or mistreatment and hence a potential area for international humanitarian protection.[41] The development of the law in this direction is ultimately likely to lead to a dispensation with the requirement of nationality when a state purports to protect individuals against another state. Indeed, this is to a certain extent already the position under the European Convention on Human Rights. Any state party to the Convention may bring before the European Commission of Human Rights or before the European Court of Human Rights a complaint against another contracting party which is deemed to have violated the Convention. It does not matter whether the individual victim of the alleged violation is not a national of the state lodging the complaint.[42] On the universal level, however, it is very doubtful whether instruments embodying human rights could as yet successfully be invoked as conferring upon

individual states juridical capacity to protect victims of infringements of human rights irrespective of their nationality.[43] In particular with respect to the law of international claims, the traditional doctrine with its insistence on the bond of nationality continues to dominate.[44]

An aspect of the tendency to regard the protection of nationals abroad merely as an integral part of the international protection of human rights is the further tendency to identify the use of force in the protection of nationals abroad with the doctrine of humanitarian intervention. Thus, apart from, or instead of self-defence, there is a growing tendency to analyse the use of force in the protection of nationals abroad in the context of the doctrine of humanitarian intervention.[45]

Apart from the fact that historically the two have existed as separate categories,[46] there would appear to be no theoretical difficulty with the identification of the use of force in the protection of nationals abroad with the doctrine of humanitarian intervention. Indeed, humanitarian intervention has an advantage over self-defence in that the former may not be confined to the protection of a state's own nationals, but may be extended to justify the protection of non-nationals within foreign territory. However, the analysis of the use of force in the protection of nationals abroad in terms of the concept of humanitarian intervention does not enhance the legal admissibility of such use of force under present international law. Neither does such analysis contribute to the clarification of the scope and conditions governing the exercise of the right

of forcible protection of nationals abroad.[47]

Self-defence as a justification for the use of force by states in their international relations is readily recognized under present international law.[48] The legal admissibility of the use of force in humanitarian intervention is, on the other hand, shrouded in controversy.[49] Theoretically, the use of force in the protection of nationals abroad escapes modern prohibitions against the use of force by states essentially because such protection of nationals will normally embody the distinguishing characteristics of the right of self-defence.[50] In particular, the use of force in the protection of nationals abroad is capable of taking a limited and temporary character. A state resorting to forcible protection of its nationals abroad often achieves its goal simply by an act of repatriation. Humanitarian intervention, on the other hand, if it is to achieve its purpose, almost invariably involves the imposition of fundamental changes in the structure, government, and/or boundaries of the state intervened.[51] This is at least what experience of humanitarian intervention has shown. The interventions of the Christian powers in the Ottoman Empire invariably forced Turkey to accept certain constitutional reforms, most of them involving the creation of new states.[52] And to take a recent example, the Indian intervention in East Pakistan facilitated the dismemberment of Pakistan.[53] The use of force in humanitarian intervention is often likely to contravene the modern principles against the use of force, in particular, Article 2(4) of the Charter which enjoins members to

refrain from the threat or use of force against the territorial integrity or political indpendence of any state. It may be argued that the use of force in humanitarian intervention is principally aimed at protecting human rights and not at impairing another state's territorial integrity or political independence, although such impairment may in fact occur as an incidental consequence. The Indian Ambassador would appear to have had this argument in mind when he contended on behalf of his Government that in its intervention in East Pakistan, India had " . . . absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering."[54] This approach to the problem, however, introduces into the law an aspect that is highly subjective, and it makes it almost impossible to draw any objective distinction between the permissible and impermissible courses of action.

It is consequently not surprising that whereas the majority of modern writers admit the legality of the use of force in the protection of nationals abroad, only a minority[55] of these writers admit the legality of the unilateral use of force in humanitarian intervention under post-1945 international law. Writers so supporting the admissibility of humanitarian intervention have largely relied on nineteenth century state practice. For modern practice, reliance has been placed heavily on instances which essentially involve the protection of nationals. These cases will be examined in detail in the following chapter.

The Indian intervention in East Pakistan and also perhaps the Tanzanian involvement in the ouster of Ugandan President Idi Amin may be the only recent cases in which the object of safeguarding the human rights of non-nationals may have furnished a predominant justification for the use of force against another state. Even these cases, however, require critical appraisal.

In 1971, India used large scale military force to assist the rebelling Bengali people in East Bengal, then under Pakistan. The intervention followed repeated allegations by India and by the exiled spokesmen for Bangladesh that Pakistan was violating minimal standards of human rights in East Bengal, killing and imprisoning large numbers of the population, causing mass flights of refugees to India and denying the people their right to self-determination. As an aftermath of the intervention, political prisoners were released, refugees returned and the Bengali people severed their province from Pakistan, thereby establishing a new independent nation.[56] The Indian intervention was favourably received by many members of the United Nations. No attempt was made to condemn India. And despite an initial Chinese veto, Bangladesh was soon admitted to membership of the United Nations. This attitude of the members of the United Nations may be viewed as an indirect recognition of humanitarian intervention, in particular, in extreme genocidal circumstances. Indeed, the Bangladesh case seems to exemplify the situation envisaged by Vattel when he stated that

> . . . if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if by his insurpportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask it and . . . to give help to a brave people who are defending their liberties against an oppressor by force of arms is only part of justice and generosity.[57]

It may not, however, be without significance that India did not simply justify her action on the ground that she was protecting the people from the violations of human rights. India also attempted to bring the intervention under the rubric of self-defence. Much emphasis was placed on the fact that the violations of human rights in East Pakistan had led to events that threatened the security of India. In a communication of 16 November, 1971, to the Secretary General of the United Nations, the Indian Prime Minister stated that Military authorities of Pakistan were pursuing a deliberate policy of suppression in East Bengal, causing a continuing large-scale flight of people from that area into India, thus placing intolerable political and social burdens on India.[58] During consideration of the intervention by the Security Council, the Indian representative argued that the Indian action was a reaction to Pakistani aggression. He explained:

> Ten million people had gone to India as refugees. That was surely a kind of aggression and had subjected India to intolerable social, financial and administrative pressures.[59]

Whether or not one agrees with this interpretation of "aggression", the mere attempt to justify the Indian intervention on the basis of self-defence is in itself worth noting. The attempt tends to betray some measure of

hesitation on the part of the Indian Government to rely solely on humanitarian motives as a basis for justifying armed intervention. The same hesitation was evident in some nineteenth century interventions,[60] and was also reflected in the views of some writers of the period who believed that humanitarian motives as a ground for intervention were admissible only as accessory to other grounds.[61] The unwillingness to rely on humanitarian intervention as a justification for the use of force was even more pronounced in the Tanzanian invasion of Uganda.

It is almost irresistable to view the Tanzanian involvement in the overthrow of Amin in April, 1979[62] as a case of humanitarian intervention. The ground of humanitarian intervention was, however, expressly rejected by the Government of Tanzania. Tanzania based its case on the ground of self-defence against Amin's aggression, in particular, against Amin's annexation of the Kagera Salient on November 1, 1978.[63] The Tanzania Daily News, a government mouthpiece, stressed that "only the people of Uganda will liberate themselves from Amin's murderous regime; Tanzania has nothing to do about this question."[64] President Nyerere reiterated this point in his speech, broadcast by Radio Dar es Salaam on 5 February, 1979 after Tanzanian troops had been ordered to cross into Uganda. He stated:

> I do not fight for others. . . . The Ugandians do have a reason to remove Amin, but we don't. It is not our business; we shall not send our troops into Uganda to remove Amin.[65]

The Tanzanian Government maintained that two wars were being fought in Uganda: "First there are Ugandans fighting to remove the facist dictator. Then there are Tanzanians fighting to maintain national security."[66] Thus, although commentators have hailed the overthrow of Amin as a triumph for human rights, and although many reactions to the Tanzanian involvement have been based on the assumption that the involvement was directed to that end,[67] the Tanzanian Government itself consciously and cautiously avoided the justification of humanitarian intervention.[68]

The dearth of instances of intervention justified largely on the basis of the protection of human rights of aliens is certainly not due to the fact that the post-1945 period has not witnessed gross violations of human rights in numerous countries. The period has witnessed alarming genocides, massacres, and many other forms of violation of human rights[69] which would have provided good cases for humanitarian intervention had states been inclined to so intervene.[70] However, states have, in general, not been disposed to intervene militarily in matters where their own interests are not involved. Indeed, it is partly due to the realization that states are unlikely to intervene unless their own interests are involved that there is much suspicion about the justification of humanitarian intervention. Even nineteenth century practice of humanitarian intervention well illustrates that there was rarely anything like "neutral humanitarian intervention." Even in the rare cases where other motives were not expressly admitted, it was

often easy to identify important strategic or security considerations which could not have failed to influence the decisions to intervene. It was indeed not fortuitous that the most notable instances of humanitarian intervention by European powers related to the Turkish Empire whose declining power left a vacuum within which the interests of major European powers were bound to clash.

Humanitarian intervention would be particularly susceptible to abuses. The potential arbitrariness with which powerful states would invade weak states under the pretext of humanitarian intervention must be evident in the absence of any clearly defined rules governing the operation of the doctrine. Franck and Rodley, for example, have listed some of the unanswered questions relating to the operation of humanitarian intervention. What kinds of acts against which human rights, under what circumstances and on what scale are hereafter to be sufficient in law to warrant the use of military force, by which outside power or powers, and under what safeguards and controls? Does the scope of humanitarian intervention encompass all "human rights" or only some? If so, which? Is self-determination within its ambit,[71] are other political and economic rights included or is it only the right to life? Is the right to intervene to be limited to situations of actual large-scale losses of life or does it also extend to the imminence or apprehension of such losses? How large-scale must the loss be? If self-determination is a protected right, how large a majority must desire it, how strongly held must their belief be?[72] Of

course not all of these questions require to be answered with certainty in order for the doctrine of humanitarian intervention to operate with certainty. But the accumulation of all these questions leaves almost unlimited room for many undesirable claims by states, like Hitler's claims of the "ruined", "robbed" and "tortured" Sudeten Germans which preceded the invasion of Czechoslovakia.[73] True, there has been since the end of the Second World War a steady process of formulating the law of human rights. In certain instances, most notably under the European Convention of Human Rights, the law of Human Rights has attained a fairly sophisticated level of judicial settlement. In general, however, the level of international enforcement is still rudimentary. Reporting, investigation, debate, condemnation, and on rare occasions, resolutions imposing sanctions would appear to be almost the only clearly recognized and viable methods of "international enforcement" of human rights. The development of modern international law in the field of human rights has not as yet been clearly translated into a principle of humanitarian intervention.

The present study is concerned with the unilateral use of force by individual states. As such, it is not necessary to go into the details of the legal position of collective use of force in humanitarian intervention under the auspices of the United Nations.[74] Moreover, with the present political set-up of the United Nations, military action by the United Nations to protect victims of human right violations does not appear as a practical possibility. A veto by any of the five permanent

members, often exercised in obedience to political loyalties rather than legal convictions, is likely to frustrate any possible action by the Security Council in the face of gross violations of human rights.

It is hoped that the foregoing discussion has demonstrated that, as yet, not much utility can be expected from the analysis of the use of force in the protection of nationals abroad in terms of the theory of humanitarian intervention. Self-defence remains the most solid theoretical basis of the right of forcible protection of nationals abroad. The fact that self-defence necessarily restricts the right to the protection of a state's own nationals is admittedly a handicap. Restricting the right of protection to a state's own nationals tends to strengthen one of the main objections to the use of force in the protection of nationals abroad, namely, that such use of force would necessarily be reserved only for the powerful states.[75] In practice, states protecting their nationals abroad have often also extended the protection to nationals of other countries. However, it will be seen in the following chapter that in these cases, the principal justification has still been one of self-defence to protect the intervening state's own nationals. Without this initial justification it is more than likely that the states resorting to force would not have so acted.

NOTES: CHAPTER 4

[1]The following can be cited among the works in which the subject of the use of force in the protection of nationals abroad has been directly associated with the concept of humanitarian intervention: L.C. Green, "Humanitarian Intervention - 1976 Version", 24 Chitty's Law Journal (1976), p. 217; "Rescue at Entebbe - Legal Aspects", 6 Israel Yb. on Human Rights (1976), p. 312; R. Lillich, "Forcible Self-Help by States to Protect Human Rights", 53 Iowa Law Review (1967), p. 325; Thomas and Thomas, The Dominican Republic Crisis 1965, 9 Hammarskjold Forum (1967), p. 18. See also Louis Sohn and Thomas Buergenthal, International Protection of Human Rights (1973), pp. 195-206 and following notes; J. Murphy, "State Self-Help and Problems of Public International Law", in A. Evans and J. Murphy, Legal Aspects of International Terrorism (1978), p. 553; Brownlie, op. cit., pp. 289-98, 338-42; T. Franck and V. Rodley, "After Bandladesh the Law of Humanitarian Intervention by Military Force", 67 A.J.I.L. (1973), p. 275.

[2]Familiar examples of humanitarian intervention during this period include: The intervention of France, Russia, and Great Britain in Greece, in 1827. [See E. Lipson, Europe in the Nineteenth and Twentieth Centuries (1949), p. 192]. The same countries, together with Prussia and Austria, intervened in Lebanon to protect the Christian population against Moslem sects in 1860. [See Stowell, Intervention in International Law (1921), p. 63; and also documents collected by Sohn and Buergenthal, International Protection of Human Rights (1973), p. 143]. The Russo-Turkish War of 1877-78; [see Stowell, op. cit., p. 127; Lipson, op. cit., p. 198 and J.A. Marriott, The Eastern Question (1940), pp. 318-38]. The United States intervention during the Cuban revolution of 1895-98. [See Moore, 6 Digest, s. 909, pp. 211-223]. See also U.S. diplomatic action affecting Jews almost throughout the world, documented by Cryrus Adler and Aaron Margalith, With Firmness in the Right (1946). Although much of this diplomatic action involved American citizens, there were some interpositions which were based on purely humanitarian grounds.

[3]See Supra. Chapt. I, esp. text to nn.6-8.

[4]See Oppenheim, International Law, Vol. I, (1912 ed.), pp. 362-69. In Oppenheim's 8th ed., by H. Lauterpacht, there are indications of a departure from this rigid conception of subjects of international law. Lauterpacht is himself a strong critic of the traditional theory of subjects of international law. His views are elaborated, for example, in his Collected

Papers Vol. I, pp. 295-307; International Law and Human Rights (1968), generally, but in particular, pp. 9-12, and 13-72.

[5]This view has had much influence on the law of international claims. See e.g. Penevezys-Saldutiskis Ry. Case P.C.I.J. Rep. Ser. A/B/No. 76; Nottebohm Case (Second Phase) I.C.J. Rep. 1955, p. 4; Barcelona Traction, Light and Power Co. Case, I.C.J. Rep. (1970), p. 3.

[6]See n. 5 of this chapt., also text to nn. 6-8 of chapt. I above.

[7]See supra. chapt. I, esp. n. 5 and text.

[8]See below nn. 14-24 of this chapt.

[9]Bk. II, cap. XX, S. XL, pp. 504-505, 506. (Carnegie tr. 1964).

[10]See e.g. cases in n. 5 of this chapt.

[11]Le Droit de Gens, Ou Principes de le Loi Naturelle Bk. II; cap. IV, s. 55, p. 131 (Carnegie tr.).

[12]Op. cit., s. 56.

[13]Hence, it may be argued that, the "right" of the intervening state was strictly speaking not "international", for it depended upon domestic civil rights of the oppressed subjects.

[14]International Law (1924, 8th ed.), s. 90, p. 343.

[15]Ibid.

[16]Ibid.

[17]Op. cit., s. 95, p. 348. See also Tanoviceano, Droit International de Intervention (1884), pp. 12-13.

[18]International Law (1861), s. 21, p. 340.

[19]The intervention resulted in an independent Greece in 1830.

[20]See 77 C.T.S., p. 307.

[21]It is indeed in this light that Wheaton viewed the preamble's reference to "protection of commerce". He suggested that it was not necessary for the intervening powers to refer to "commerce" for the intervention would easily have been brought within the rubric of self-preservation by the somewhat extensive principle that "whatever a nation may lawfully defend for itself, it may defend for another people if called upon to interpose". See Elements of International Law (1863), pp. 128-29.

[22]Indeed, it may be noted that initially most European powers had adopted nonintervention as a guiding principle. Austria and Prussia adhered to this principle to the end, maintaining that they "would not agree to the coercion of Turkey in favour of rebellious subjects". See Lipson, op. cit., pp. 188-93.

[23]For Rel. 1898, p. 750. Also Moore, 6 Digest, s. 909, pp. 211-223.

[24]International Law (1911), p. 194.

[25]See e.g. the interventions in Greece, Lebanon and the Russo-Turkish war, n. 2 of this chapt.

[26]See Lawrence, The Principles of International Law (1895), pp. 132-33; Woolsey, Introduction to International Law (1860), p. 11; Rougier, "Theorie de L'Intervention d'humanite" 17 Revue Generale du Droit International (1910), p. 472; Westlake, International Law, part I, (1904) pp. 306-7; Stowell, Intervention in International Law (generally); Phillimore, International Law Vol. I, (1879), pp. 568 seq., 618 seq.; Wheaton, Elements of International Law (1863), p. 126 seq.

[27]Thus Stowell was of the view that

> " . . . it was a basic principle of every human society and of the law which governs it that no member may persist in conduct which is considered to violate the universally recognized principles of decency and humanity." op. cit., pp. 51-2.

See also Westlake, Ibid.

[28]See n. 21 of this chapt.

[29]See Phillimore, op. cit., p. 618 seq. See also p. 569.

[30]Indeed, Russian rulers, for example, traditionally considered it their duty to protect Christian minorities under

Turkish rule. See Lipson, op. cit., pp. 188-90.

[31]See also Brownlie, International Law and the Use of Force by States (1963), p. 338.

[32]States resorting to humanitarian intervention tended to view the conduct objected to not as constituting violation of human rights but as conduct falling outside the behaviour of "civilized nations". To a large extent, a clearer conception of the role of international law in protecting human rights was hindered by the rigid conception of subjects of international law. As long as the view persisted that international law concerned itself only with sovereign states, there was little chance of formulating international law rules or principles regarding human rights. See Lauterpacht, Collected Papers, Vol. I, pp. 280-97.

[33]For indeed, even in the earlier actual practice of states, the rigid conception of the subjects of international law was not always followed. For a detailed discussion of the various inroads into the conception, see H. Lauterpacht, International Law and Human Rights (1968), pp. 9-12, 13-72, and J.G. Starke, "Human Rights and International Law", in Human Rights (1978) edited by Eugene Kamenka and Alice Erh-Soon Tay.

[34]Art. 1(3) of the U.N. Charter.

[35]See e.g. Arts: 1(1), (2), (3), 13, 14, 40, 55, 56, 62, 68, 73 and 76.

[36]Res. 217 A (III), G.A.O.R. Resolutions (A/810) at 71-77.

[37]See for example: the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, entered into force in Sept. 1953, E.T.S. no. 5; U.K.T.S., 70 (1950) Cmnd 8969. International Covenant on Civil and Political Rights, 1966, G.A.O.R., XXI, Suppl. No. 16 (A/6316), pp. 52-8; 61 A.J.I.L. (1967), p. 870; The Covenant came into force in 1976. The International Covenant on Economic, Social and Cultural Rights, 21 G.A.O.R., suppl. No. 16 (A/6316) at 49-52; this Covenant also came into force in 1976. The International Covenant on the Elimination of All Forms of Racial Discrimination, 1966. See U.K.T.S. 77 (1969) Cmnd. 4108; 60 A.J.I.L. (1966), p. 650; the Covenant came into force in January, 1969. Convention on Political Rights of Women, 193 U.N.T.S. p. 135, entered into force on July, 1954.

[38]For more detailed compilation of the numerous U.N.

instruments dealing with human rights, see Human Rights: A Compilation of International Instruments (U.N., New York, 1978). Also see James Avery Joyce, Human Rights: International Documents (1978). At the regional level, the European Convention of Human Rights 1950 [E.T.S. no. 5;] which came into force in Sept. 1953 deserves specific mention.

[39] International Law Vol. I, p. 312.

[40] "Humanitarian Intervention" in Law and Civil War in the Modern World (1974, edited by John Norton Moore) p. 217.

[41] See e.g. McDougal, Lasswell and Chen, "The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights" 70 A.J.I.L. (1976), p. 432; also by the same authors, Human Rights and World Public Order (1978) p. 737; Garcia-Amador, Sohn, and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974), generally.

[42] See Arts. 25 and 48 of the Convention. See for example Ireland V the United Kingdom Eur. Court. H.R. Series A, 1978; 17 I.L.M. (1978), p. 680. The case arose by a complaint by the Republic of Ireland against Great Britain relating to measures taken by the British Government against some of its nationals in Northern Ireland. See also The Greek Case dealt with by the European Commission of Human Rights, (12 Y.B.E.C.H.R.) p. 511 (1969). The applicants in the case were Denmark, Sweden, Norway and the Netherlands, against Greece concerning measures taken by the latter against its nationals. Individual citizens may also bring complaints before the Commission. They cannot, however, complain before the Court, although individual complaints could ultimately reach the Court through the Commission. Materials on the working of the European Commission can be found in the Yearbook of the European Commission on Human Rights, vols. 1-22 (from 1955-1979).

[43] See, however, the dissenting opinions of Judges Wellington Koo, I.C.J. Rep. 1966, p. 214; Koretsky, I.C.J. Rep. 1966, p. 237; Tanaka, I.C.J. Rep. 1966, p. 248 and Jessup, I.C.J. Rep. 1966, p. 323 in the South West Africa Cases (Second Phase) (1966), I.C.J. Rep. 1966, p. 4. In general, these judges expressed opinions to the effect that the mandate system instituted by the League of Nations over South West Africa, generated legal rights capable of enforcement by individual members of the League of Nations. See in particular the view of Judge Tanaka who went further and argued as a matter of general principle that humanitarian considerations incorporated in treaties and international organizations generated "legal

interests" pertaining to individual parties or members. See I.C.J. Rep. 1966, p. 252. The question before the Court was whether or not Ethiopia and Liberia, former members of the League of Nations, were entitled to seek the Court's declarations in relation to the governing of South West Africa (Namibia) by South Africa. In rejecting the claims of Ethiopia and Liberia, the Court also expressly rejected the view that humanitarian considerations were sufficient in themselves to generate legal interests, and hence legal capacity to seek judicial remedy. See I.C.J. Rep. 1966, p. 34.

[44]See the observations of the International Court of Justice in the Barcelona Traction Light and Power Co. Case I.C.J. Rep. (1970), p. 3 at p. 47; para. 91.

[45]See n. I of this chapt.

[46]See text to n. 3 of this chapt.

[47]The reasons for this will become apparent in the course of the following discussion.

[48]See Chapt. 3 above, esp. n. 2.

[49]See, for example, the contrasting views of Richard Lillich, 53 Iowa L.R., p. 325 and also "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives", in Law and Civil War in the Modern World (1974), p. 229; and McDougal and Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern", 62 A.J.I.L. (1968), p. 1, on the one hand, and on the other hand, see Ian Brownlie, "Humanitarian Intervention". See n. 40 of this chapt; and Franck and Rodley, "After Bangladesh, the Law of Humanitarian Intervention by Military Force", see n. 1 above.

[50]See chapt. 2 generally and text to nn. 50-69 of chapt. 3.

[51]See Franck and Rodley, op. cit., p. 283.

[52]The intervention in Greece ended in the independence of Greece. The Russo-Turkish war resulted in local autonomy for a Christian government (under Turkish suzerainty) in Bulgaria, and also ended in the occupation of Bosnia and Herzegovina by Austria-Hungary (see Treaty of Berlin 1878, 153 C.T.S., p. 172). The intervention in Lebanon led to the adoption of a new constitution which apparently left the regulation of the region in the hands of the representatives of the intervening powers.

[53]See below, text to n. 69.

[54]See U.N. Doc. S/PV 1606, 4 Dec. 1971, p. 86.

[55]See e.g. Lillich, McDougal and Reisman, and Green (see n.f. of this chapt.).

[56]For this summary of the facts we are indebted to Franck and Rodley, op. cit., p. 275. Of course the movement toward separation was already underway when India intervened. It is, however, doubtful whether without massive Indian support the Bengali people would have been successful in their rebellion.

[57]See supra, n. 12 of this chapt.

[58]U.N. Yearbook, 1971, p. 145. One cannot also ignore other serious political differences that then existed between India and Pakistan. These differences were indeed serious enough in themselves to draw the two countries towards an armed confrontation. See U.N. Yearbook, 1971, p. 143 seq.

[59]U.N. Yearbook, 1971, p. 147.

[60]See e.g. text to nn. 19-23 of this chapt.

[61]See text to n. 18 of this chapt.

[62]For a fairly detailed account of the overthrow, see African Contemporary Record, Vol. II, 1978-79, B. 421.

[63]Ibid., B. 426.

[64]Ibid., B. 429-30.

[65]Ibid., B. 430.

[66]Ibid., B. 433.

[67]See e.g. Newafrica, June 1979, p. 49; Sept. 1979, p. 11, containing a coverage of the July Monrovia O.A.U. Summit. The Ugandan case was discussed at the Summit without being on the agenda. The discussion ended inconclusively.

[68]Admittedly, there are questions that may be raised against the Tanzania claim that its action in Uganda was purely

defensive. For example, Tanzania did not stop at merely recapturing its territory from Uganda, or even at merely removing a potential threat in Uganda. For many months after the defeat of Amin, Tanzanian troops remained in Uganda and partook in its administration. Tanzania may also be said to have introduced Milton Obote who ultimately became the President of Uganda. Moreover, the Ugandans who fought along side Tanzania troops were largely trained in Tanzania. The assistance given by Tanzania to these Ugandans was certainly not a spontaneous retaliation against Amin's aggression. Nevertheless, some of these doubtful aspects of the intervention were also not even consistent with humanitarian intervention.

[69]See Franck and Rodley who have enumerated some of the most glaring examples, op. cit., pp. 295-96. See also a country by country human rights record compiled by the U.S. Dept. of State and submitted to the Committee on Foreign Affairs, U.S. House of Representatives and to the Committee on Foreign Relations, U.S. Senate. Country Report on Human Rights Practices, 1979 (Washington, D.C.). The report discloses disconcerting cases of violations of human rights in Asia, Africa, and Latin America.

[70]Even as early as 1938, Professor H.A. Smith lamented against the indifference of states to atrocities taking place outside their borders. He stated:

> "In practice, we no longer insist that states shall conform to any common standards of justice, religious toleration, and internal government. Whatever atrocities may be committed in foreign countries, we now say that they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilized society is now deemed to be no obstacle to diplomatic friendship. In our own day, we have witnessed a tremendous religious persecution, perhaps the greatest ever known in the history of the world, but has not debarred us from inviting the government responsible (Germany) for that persecution to join the League of Nations with the special honour of a seat upon the Council. . . ." 19 The Listener (1938), p. 183.

[71]Of course there has been something akin to humanitarian intervention by some members of the U.N., in particular members of the O.A.U., in their support for liberation movements against white minority regimes in Southern Africa. Such assistance has been supported by the U.N. General Assembly on several occasions. [See e.g. the Declaration of International Law Concerning Friendly Relations and Co-operation Among States, adopted by the General Assembly without vote on 24 Oct. 1970. See U.N. Yearbook, 1970, p. 785. Under the Declaration, people resisting oppression or alien dominance may call upon Member States to

help them in their resistance]. These cases of intervention against colonialism are clearly anomalous and may not properly be extended to serve as a basis for formulating any general principle of intervention on behalf of people seeking self-determination. In fact, most Western countries tend to contest the legality of assisting liberation movements even in the colonial or semi-colonial situation in Southern Africa. It is also worth noting the lack of consensus among African states on the question of "liberation movements" in Eritrea, or the Polisario Front in Morocco. Neither did the African states propose military intervention on behalf of the Biafrans although a few did recognize the new state of Biafra.

[72]Op. cit., p. 276.

[73]See International Conciliation, 1938, p. 401. Hitler's speech appears at p. 411 seq.

[74]Despite the fact that the Charter contains numerous references to human rights, it does not confer any specific powers on the Organization with respect to the enforcement of human rights. A possible objection to the use of force under the auspices of the United Nations to protect human rights would be based principally on Article 2(7) of the Charter which negates the authority of the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any state". The overall meaning of this, so-called "Domestic Jurisdiction" clause, has never been authoritatively determined. [See R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), pp. 58-130; A. Ross, "The Proviso Concerning 'Domestic Jurisdiction' in Art. 2(7) of the Charter of the U.N."; 2 Osterreichische Zeitscher furr Off. Recht. (1950), 562; Waldock, "The Plea of Domestic Jurisdiction Before International Legal Tribunals" 31 B.Y.J.L., p. 98; M. Rajan, The United Nations and Domestic Jurisdiction (1961), H. Lauterpacht, International Law and Human Rights (1968), pp.9-12]. Some have indeed viewed this clause as standing in the way of humanitarian intervention by the U.N. [See e.g. Thomas and Thomas, The Dominican Crisis 1965, p. 23; Rappard, The Annals of the American Academy of Political Science, Jan. 1946, p. 119]. Members against whom allegations of human right violations have been made have also persistently invoked the clause to deny the competence of the U.N. to deal with such violations. [See e.g. The Case of Russian Wives discussed in the 6th Committee of the General Assembly, 2-7 Dec. 1948; 3 (pt. I) G.A.O.R., C.6. pp. 718-81; The Observation of Human Rights in Bulgaria, Hungary and Romania Case, in the General Committee, 6-7 April, 1949, 3 (pt. 2) G.A.O.R., General C., at 7-39; The Treatment of Indians in the Union of South Africa Case, discussed in the 6th (Legal) and Ist (Political) Committees of the General Assembly, 1946, I

(pt. 2), G.A.O.R., C.1 and C.6, p. 111; also discussed in the General Assembly 7-8 Dec. 1946, I (pt. 2) G.A.O.R., plenary, pp. 1006-61]. Such claims have almost invariably been rejected by the U.N. The reasons for rejecting the claims based on the clause have, however, generally been left vague, with the result that much that has been concluded from the practice of the U.N. has tended to take only a speculative character. [See e.g. Lauterpacht, Ibid.]. The only clear authority which the Charter confers upon the U.N. to employ force is the one under Chapter VII with respect to threats to international peace and security. Indeed, measures taken under the provisions of Chapt. VII are expressly excepted under Art. 2(7). Thus if violations of human rights are of such nature as to constitute a threat to international peace and security, the U.N. would be entitled to intervene, if necessary, by force. [See Lauterpacht, op. cit., pp. 173-88; McDougal and Reisman, 66 A.J.I.L. (1968), p. 14; Lillich, 53 Iowa L.R., p. 338; Brownlie, "Humanitarian Intervention:, pp. 226-27]. The problem with relying on this proviso however, is that international peace and security may not be directly threatened by violations of human rights within a state's own borders. For international peace to be threatened, it may require some "illegal" reaction on the part of other states, unless it can be argued that the violations of human rights in a given country are so revolting to other states that the latter may be justified in taking some hostile action. Such an argument of course leads us to the same question of whether or not a state may lawfully take unilateral action to remedy violations of human rights in another. [See for example, the Bangladesh and Uganda cases. One may also add the situations posed by the repressive regimes in Smith's Rhodesia and South Africa].

[75]See also the comments of the General Claims Commission in the North American Dredging Co. Case supra chapt. I n. 58.

CHAPTER 5

THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD AND POST-1945 STATE-PRACTICE

In the preceding three chapters, the use of force in the protection of nationals abroad has been examined almost exclusively in the context of theoretical conceptions of general principles of international law governing the use of force by states. The central concern has been the determination of the legal implications of certain relevant post-1945 principles of international law on the customary law "right" of armed protection of nationals abroad. It is hoped that the examination has indicated, first, that most forms of armed coercion justified on the basis of the customary law "right" of protection of nationals abroad may not have survived the post-1945 legal developments in international law relative to the use of force by states. And secondly, however, that a narrowly defined "right" of armed protection of nationals abroad appears to hold a place in the theoretical legal framework of post-1945 international law relative to the use of force. It is the purpose of this chapter to examine this "right" of armed protection of nationals abroad in the context of the actual claims of states in their international relations.[1] The examination will take the form of a fairly detailed study of several post-1945 cases in which the use of force by states within foreign borders was justified either wholly or partially

on the basis of protection of nationals. Not all the cases are in their facts illustrative of the problem that forms the subject of this thesis. Indeed, in one or two of these cases, there was almost no factual basis for the claim that force (or intervention) had been resorted to in order to protect nationals. And again, in one or two of these cases, troops were landed in a foreign state with the consent of the incumbent local authorities. These cases do, however, contain some important general views of the states involved on the subject of protection of nationals abroad. Moreover, it is also necessary to clarify the proper classification of these cases. All the cases will be discussed in their chronological order as follows.

The Anglo-French Invasion of Suez, 1956[2]

The Anglo-French invasion of the Suez Canal Zone in 1956 is one of those cases in which there was almost no factual basis for the claim that force had been employed in order to protect nationals.

In July, 1956, Egypt, under the leadership of Nasser, nationalized the Suez Canal Company, a company in which there were considerable British and French interests, and took over the running of the Suez Canal. On October 29, 1956, Israel ordered a full-scale invasion of Egyptian territory in the area of the Suez Canal Zone. On October 30, the United States placed before the United Nations Security Council a draft resolution calling upon member states not to assist Israel. The draft

resolution was vetoed by France and the United Kingdom. The British representative expressed the view that the Security Council would not take any constructive action to stop the fighting and to safeguard the free passage of ships through the Suez Canal. Meanwhile, France and Britain issued a 12-hour ultimatum to Egypt and Israel, demanding that they call a ceasefire, withdraw their forces from the Suez Canal area and allow British and French troops to be stationed along the Canal. The ultimatum was not complied with by Egypt, and on October 31, British and French troops invaded the Suez Canal area. The troops were soon evacuated in deference to a United Nations Generaly Assembly resolution.

Britain and France availed themselves of a number of justifications for the invasion. Chief among these were the necessity to stop hostilities between Egypt and Israel, the necessity to defend the Suez Canal from stoppage of traffic, the necessity to prevent nationalization of the Universal Suez Canal Company by Egypt, and the necessity to establish a regime for the Canal, assuring future freedom of traffic.[3]

The British and French governments also invoked the justification of protection of nationals. Responding to strong criticism by the Labour Opposition Party, the British Prime Minister, Eden, argued in the House of Commons that there was nothing in international law which abrogated the right of a government to take such steps as were essential to protect the lives of citizens and vital rights such as were then at stake. He further contended that the right of self-defence recognized in

Article 51 of the Charter covered "an imminent threat to (our) nationals", and that it was not necessary to wait until an attack had actually been launched.[4] A more elaborate argument to the same effect was made by the Lord Chancellor Viscount Kilmuir in the House of Lords:

> . . . But self-defence undoubtedly includes a situation in which the lives of a state's nationals abroad are threatened and it is necessary to intervene on the territory for their protection. . . .[5]

His Lordship went on to enumerate the conditions for the lawful exercise of the right, namely: imminent danger of injury to nationals, failure or inability on the part of the local authorities to protect the nationals in question, and confinement of measures of protection strictly to the object of protecting nationals against injury. He also expatiated on Article 51 of the Charter, explaining why the article should not be read as limiting the customary law right of self-defence.[6]

Despite these detailed discussions of the law, there was naturally little reference in these arguments to the facts on which the justification of protection of nationals was based. Viscount Kilmuir made a cursory reference to the danger to "nationals . . . at Ismailia",[7] but that was about all that was said with respect to the facts. Indeed, Lord McNair, while agreeing with the interpretation of the law, was highly critical as to whether such arguments of the law were called for.[8] And in response to similar arguments by the French Government, the Government of the Soviet Union emphasized the irrelevance of the justification of protection of nationals.

> In carrying out military measures directed against Egypt, the French Government alleges that it is doing this with a view to protecting French Nationals living in Egypt. But who could take such assertions seriously when it is well known that no one has been threatening French nationals in Egypt? In this connection it would not be out of place to recall that this method has frequently been resorted to previously as a pretext for seizing and enslaving countries of the East.[9]

The very Anglo-French operations in the Suez - the bombing of Egyptian Air Force bases and a number of other targets like the Cairo radio transmitter, military concentrations and communications leading to the Canal zone[10] - were strategically hardly consistent with the protection of British or French nationals. The conflict between Israel and her Arab neighbours, the conflict between Arab nationalism and the determination on the part of France and Britain to retain control over the Suez Canal, and the broader conflict between the Western powers on the one hand and the Soviet Union on the other, are the issues which characterized the Suez crisis. Economic, political, and strategic considerations are the ones which appear to have prompted and shaped the nature of the invasion. It is in fact in the light of these considerations that many states, including the United States, condemned the Anglo-French invasion of Suez. Many countries simply ignored the justification of protection of nationals. The numerous resolutions in the United Nations concerning the invasion made no mention of the problem of danger to French or British nationals.

Thus, the Suez case does not constitute any precedent on the subject of use of force in the protection of nationals

abroad. The case may be considered significant only to the extent that the government invoking the justification of protection of nationals could be said to have believed that the protection of nationals abroad constituted a legitimate aspect of the right of self-defence. The case provides evidence that the French and British governments thought that military action for the purpose of protecting nationals abroad is legitimate, thus making it difficult for the two governments to deny the right of forcible protection of nationals abroad to other states. On the negative side, however, the case demonstrates only too well the possible abuses to which the justification of protection of nationals may be liable. The justification can be used as a pretext for less savory intentions.

The United States Landing in Lebanon, 1958[11]

The United States landings in Lebanon is another case where the justification of protection of nationals did not really have any factual basis. Following the outbreak of an armed insurrection in Lebanon, the representative of Lebanon in the United Nations requested an urgent meeting of the United Nations Security Council to consider the situation. The United Nations responded by the despatch of a military observer team to Lebanon. However, with the deterioration of the situation, not only in Lebanon, but also in the neighbouring Arab states of Iraq and Jordan, the United Nations' efforts to ease the problems of Lebanon proved inadequate. Thereupon, the Lebanese

President, Chamoun, with the concurrence of his cabinet, requested United States military support to contain the rebellion. On 15 July, the United States' President, Eisenhower, announced in a message to Congress the despatch of United States' forces to Lebanon on 14 July, 1958.

Perhaps the only plausible justification for the United States action in Lebanon was the invitation by the Chamoun Government which was then, if only nominally, the ruling authority in Lebanon. Indeed, "invitation" was the dominant United States official justification. The action was claimed to be a form of collective self-defence to preserve the independence and integrity of Lebanon against indirect aggression.[12] It was the same justification that also formed the basis of the support of other governments like Britain,[13] Turkey, Iran, and Pakistan.[14]

The United States did nevertheless refer to the justification of the protection of American lives in Lebanon. The justification was clearly supplementary and was not pressed as forcefully. In his message to Congress, President Eisenhower stated that in response to Chamoun's appeal, the United States had despatched a contingent of United States' forces to Lebanon "to protect American lives and by their presence there to encourage the Lebanese Government in defence of Lebanese sovereignty and integrity."[15] The President also mentioned that there were about 2,500 Americans in Lebanon.[16] He did not, however, elaborate on the nature of the danger to these Americans. Before the actual landings in Lebanon, Dulles,

the United States' Secretary of State, had also alluded to the justification of protection of nationals. Dulles said in an official statement:

> Now what we would do if American life and property was endangered would depend, of course, in the first instance upon what we were requested to do by the Government of Lebanon. We do not introduce American forces into foreign countries except on invitation of the lawful government of the state concerned.[17]

From Dulles' statement alone, it may possibly be concluded that the United States would not, without the consent of the local authority, introduce troops into a foreign state for the purpose of protecting its own nationals.[18] Dulles' statement should perhaps be interpreted exclusively in relation to the problem at hand. The statement that the United States would introduce troops in a foreign state for the protection of its nationals only upon invitation by the local authorities would appear to stand in contrast to the overall United States' practice.[19] Dulles might only have been attempting to prepare his audience for the subsequent United States' landings in Lebanon, which were, of course, made upon invitation; and might not have been attempting to state on an enduring United States' policy regarding the protection of nationals abroad.

The Soviet Union and, to some extent, the People's Republic of China, responded to the United States' half-hearted claim of protection of American lives. Their statements on the alleged justification of protection of nationals provide some insight into the attitude of the two countries toward the protection of nationals abroad. The Soviet Union expressed the

following view:

> The statement (of the United States Government) alleges that the United States has sent its troops to Lebanon to demonstrate United States concern for the integrity and independence of Lebanon, which so it claims, are being threatened from without and also to protect American citizens in that country.
>
> The complete absence of any grounds for the contention is self-evident, for no one is threatening Lebanon's integrity and independence. . . . As for "concern" for the safety of American citizens, one may be permitted to ask what standards of international law allow foreign powers to send their armed forces to the territories of other states for such purposes. There are no such standards in international law. It is common knowledge, however, that reference to the need to protect their citizens has, from time immemorial, been a favourite device of all colonists to justify gangster-star like attacks on small countries.[20]

The Soviet statement appears to ignore the fact that had the United States troop landings in Lebanon been really directed at protecting American citizens, such protection could have been at the express authorization of the Lebanese Government. It cannot be contended, as might be implied from the Soviet statement, that a state is violating any standards of international law by resorting to armed protection of its nationals if such protection is authorized by the local authorities who may regard themselves as incapable of providing adequate protection. Of course it is possible that in such cases, the "protection of nationals" may only be a cover for wrongful interference to keep an unpopular government in power against popular demand.[21] Yet, this is an altogether different question.

The United States does not appear to have seriously believed that there was any danger to its nationals in Lebanon.

In response to international pressure,[22] and, according to the United States Government, as a result of the changed situation in the Middle East, the United States soon withdrew from Lebanon. In a memorandum to the Secretary General of the United Nations, the United States, while citing the justification of protecting Lebanese independence and integrity, made no mention of the protection of nationals.[23] Thus, the comments relating to the precedential value of the Suez case equally apply to the present case. These cases cannot truly be considered as instances of the use of force in the protection of nationals abroad.

The Stanleyville Belgian-United States Rescue Operation, 1964[24]

On November 24, 1964 Belgian troops with the help of United States transport plans landed in Stanleyville (Kisangani), Democratic Republic of the Congo (Zaire) for the purpose of rescuing hundreds of foreign civilian nationals, mostly Belgians, who had been captured and held as hostages by the insurgent group which had taken control of the Stanleyville area. The operation lasted for four days and between 1,500 and 2,000 civilians of different nationalities were in fact evacuated from Stanleyville.

Thus, unlike the Suez and the Lebanon cases, there could be no doubt that the Congo case was substantially a case of protection of nationals abroad. Strictly speaking, however, the Stanleyville operation did not involve any violation of the sovereignty of another state. The Belgian troops were landed in

Stanleyville with the express permission of the Tshombe Government which was the de jure, though by no means de facto, authority of the Stanleyville area. Yet, the Congo case should not perhaps be appraised on exactly the same terms as, say, the West Germany Commando attack on a hijacked Lufthansa aircraft at Mogadishu, Somalia, in October, 1977.[25] In this latter case, the consent given by the Somali Government was uncontroversial. Tshombe's authority, at least in the Stanleyville area, was highly controversial. The majority of the members of the Organization of African Unity (O.A.U.) and of the Communist Bloc, challenged Tshombe's authority and were also critical of his motives in authorizing the Belgian landings.[26] Thus, although it was still argued in favour of the operation that it had been carried out with the express authority of the Congo Government,[27] there was an apparent need to rest the case for the operation on an independent justification. As a result, the justification of protection of nationals (and other foreigners in Stanleyville) - independent of the justification of invitation - assumed particular significance.

It was the appeal to the humanitarian character of the rescue operation that dominated the statements by the United States, Belgium, and also Britain which, in a way, had participated in the operation by permitting the paratroops, as part of the preparation for the rescue operation, to use the Ascencion Airport. The United States' official statement read:

This operation is humanitarian - not military. It is

> designed to avoid bloodshed - not to engage the rebel forces in combat. Its purpose is to accomplish its task quickly and withdraw - not to seize or hold territory. Personnel engaged are under orders to use force only in their own defence or in the defence of foreign and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished.[28]

The Belgian statement echoed the claim that the operation was not a military one but a "humanitarian action whose objective was limited to saving endangered lives":

> In exercising its responsibility for the protection of its nationals abroad, my government found itself forced to take this action in accordance with the rules of international law, codified by the Geneva Conventions.[29] What is involved is the legal, moral and humanitarian operation which conforms to the highest aims of the United Nations: the defence and protection of fundamental human rights and respect for national sovereignty.[30]

Although many facts were in dispute, it would appear that on the whole, the theoretical minimal conditions for the exercise of the right of protection of nationals abroad were present in the Stanleyville operation. There could be little doubt as to the reality of the danger to the lives of civilian nationals in the Stanleyville region. The rebels had in desperation threatened to kill these civilians should the government forces which had been pressing on the rebel forces continue with their advance. Indeed, according to some reports, denied by some members of the O.A.U., about twenty of the hostages had already been killed the day before the rescue operation and many others had been brutally threatened and physically mistreated.

> Only the timely arrival of the rescue mission prevented a further and more terrible wave of executions. . . . Time, for the lives of those people was calculable only in minutes.[31]

Numerous efforts were made by governments, in particular by by the Ad Hoc Committee of the O.A.U., to secure the safety of the hostages. There were conflicting accounts as to whether these efforts would have succeeded. Some members of the United Nations claimed that the Ad Hoc Committee was in the process of obtaining the release of the hostages when the rescue operation took place, that the Committee had obtained an assurance from the rebel authorities that the hostages would be safe as long as negotiations continued.[32] There was, however, little basis for this optimism, in particular when there were fears that some hostages had already been executed. In any case, the people held as hostages had primarily nothing to do with the negotiations that had been going on between the rebels and the Committee. It was only their continued detention that made them an issue in these negotiations. So there was no reason to condition their release upon the continuation of the negotiations. Moreover, it could not have been very advisable to chance the slaughter of over a thousand innocent men, women, and children considering that one was here dealing with a rebel group over which the O.A.U. did not have the slightest control. Thus, it could not be said that in the Congo case there were other less drastic alternatives by which to protect the nationals.

The operation lasted for four days in which over one thousand civilians were actually evacuated. There could therefore be little doubt about the essential purpose of the operation, that it was aimed at the saving of life. Indeed,

this point was much emphasized by the government of the United States.[33] However, the actual rescue operation inevitably involved fighting between the invading troops and the rebels. How much this fighting tilted the military balance in favour of the Tshombe troops, and whether this tilting of the military balance may have been an intended by-product, are questions that have not been settled and answers to which have tended to vary according to the overall view one has taken of the rescue operation.[34]

States which were opposed to the Stanleyville operation generally viewed the "saving of lives" as a mere pretext for intervention in favour of Tshombe's government.[35] These charges were vaguely associated with the problem of "colonialism" and "imperialism" and were no doubt partly influenced by (and even excusable on the basis of) the preceding conduct of the Belgian Government in the Congo.[36] Consequently, the states which expressed hostility toward the Stanleyville operation did not actually address themselves to the specific issue of protection of nationals, but to the broader political questions. Their criticism of the operation may thus not necessarily and unequivocally be interpreted as a rejection of the right of protection of nationals abroad.

It must be noted that in the Stanleyville operation, the nationals rescued were not only those of the states which took part in it, but also of other states including Congolese civilians.[37] This aspect of the operation may justify the analysis of the Stanleyville case as an instance of humanitarian

intervention.[38] There could be little doubt, however, that the primary objective of the rescuing powers was the protection of their own nationals who in fact formed the majority of the hostages. This point is made clear in the official statements by the United States and Belgian governments. Both these governments emphasized that their action constituted an exercise of their responsibility to protect their citizens.[39] The protection of the hostages of other nationalities was in a way only incidental. Indeed, the United States' Ambassador to the United Nations explicitly stated that:

> While our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of 18 other nationalities from their dreadful predicament.[40]

Thus, with only one qualified reservation - that the operation did not strictly involve a violation of the sovereignty of a state - the Congo case may properly be included among post-1945 cases of use of force in the protection of nationals abroad.

The United States Action in the Dominican Republic, 1965[41]

On 28 April, 1965, the civil strife in the Dominican capital of Santo Domingo left the country without an effective government. On the night of the same day, between 400 to 500 United States Marines landed in Santo Domingo. Throughout the early days of its involvement in the Dominican crisis, the United States justified the Marine landings in Santo Domingo on the ground of the protection of its nationals and nationals of other countries.[42] On April 28, President Johnson stated that

Marines had been ordered to land in the Domincan Republic "to give protection to hundreds of Americans who were still in the Dominican Republic and to escort them safely back to this country."[43] On May 1, the President stated:

> For two days American forces have been in Santo Domingo in an effort to protect the lives of Americans and nationals of other states in the face of increasing violence and disorder.[44]

The Department of State's legal advisor, Meeker, reiterated this claim. "We landed troops in the Dominican Republic in order to preserve the lives of foreign nationals - nationals of the United States and many other countries."[45] During the Security Council debate on the Dominican crisis, the United States Ambassador, Mr. Stevenson, was to claim that in fact some 2,000 United States citizens and about 1,000 persons of other nationalities had been successfully evacuated.[46]

The justification of protection of citizens was no doubt plausible during these early phases of the United States involvement in the Dominican crisis. There was obvious danger to the lives of foreigners in Santo Domingo in the light of the fighting going on in the city and the collapse of effective government. Thousands of foreigners were in fact evacuated from Santo Domingo. Action by the United Nations (if possible), or by the Organization of American States (which was, in fact, instituted at a later stage but for different objectives) would likely have involved prolonged consultations and a time lag that might have been costly in terms of lost lives. This point was indeed stressed by Johnson in his broadcast statement of

May 2, 1965,[47] stating that in the "situation hesitation and vacillation could mean death for many of our people, as well as the citizens of other lands."[48]

Inconsistently with the object of protecting nationals, however, the 400-500 United States Marines in the Dominican Republic were not immediately repatriated. On the contrary, they were rapidly augumented and soon, there were close to 20,000 United States troops in the Dominican Republic.[49] Thus, although the justification of protection of nationals was never abandoned, the United States Government began to invoke other justifications seemingly more consistent with the troop buildup and the continued presence in the Dominican Republic. Among these included the need to "quell bloodshed", to "restore normal conditions in the Dominican Republic", to maintain "the security of its inhabitants and the inviolability of human rights", and to help the Dominican people re-establish a constitutional government."[50]

These seemingly humanitarian motives for the continued involvement in the Dominican crisis were also greatly influenced by the suspicion that communists were attempting to take advantage of the crisis. President Johnson declared in connection with the crisis:

> . . . the American nations cannot, must not and will not permit the establishment of another communist government in the Western Hemisphere. This was the unanimous view of all American nations when, in January, 1962 they declared, and I quote: "The principles of communism are incompatible with the principles of the American system."[51]

The charge that communists were taking advantage of the crisis

was reiterated by Ambassador Stevenson in the Security Council.[52] However, even singly, the humanitarian justification of restoring peace in the Dominican Republic was not uncontroversial. Many governments were unhappy about the United States unilateral action even if such action were truly for humanitarian ends.[53] Many states expressed preference for collective action through the Organization of American States (O.A.S.) but even better through the Security Council of the United Nations.[54] Indeed, the countries that tended to sympathesize with the United States action appear to have done so largely because of the subsequent involvement of the O.A.S. Even the United States Government itself tried its best to associate its unilateral action with the O.A.S. by alleging, ex post facto, that the action was merely a stop-gap measure before the O.A.S. would be in a position to take effective action.[55]

Many states that commented on the United States action in the Dominican Republic did not actually refer to the justification of protection of nationals. This perhaps should be expected. The concern of many states was the continued and increasing presence of United States troops in the Dominican Republic. And as far as this was concerned, it must have occurred to these states that the protection of nationals was no longer a relevant part of the issue. The Soviet Union and Cuba, who were among the few countries that referred to the justification of protection of nationals merely viewed the justification as a "pretext" by the United States to pursue

other political objectives.[56] Somewhat implicitly, the Cuban Government denied altogether the viability of "protection of nationals" as a ground for one state to land its troops in another state. It was contended that if any powerful country could assume the right to land troops on the territory of any small country in which some of its citizens lived or owned property, no weak country anywhere would be able to enjoy sovereignty or independence. This is indeed a most frequently encountered argument against the admissibility of the "right" to protect nationals abroad by means of armed force. However, the argument clearly ignores the fact that the "right" to land troops on foreign territory does not arise unless nationals are in danger and the local sovereign is unable or unwilling to provide the necessary protection. Where weak or small countries discharge their international law obligations toward foreign nationals (and their property), there is no reason why such states may not be able to enjoy sovereignty and independence, unless by sovereignty and independence one means unrestrained freedom even by international law to indulge in any conduct even if such conduct inflicts irreparable injury on foreign nationals.

Another country that made particular reference to the United States justification of protection of nationals was France. The French representative at the Security Council debate was sympathetic with the cause of protecting the lives of nationals endangered in the Dominican conflict. More importantly, however, the French representative expressed the

view that such operations as are aimed at the protection of nationals must be limited in objective, duration and scale or run the risk of becoming armed interventions.[57] As far as the use of force in the protection of nationals abroad is concerned, the statement of the French representative would indeed appear to sum up the precedential value of the Dominican case.

The conditions requisite for the use of force in the protection of nationals abroad would appear to have been present during the early phases of the Dominican crisis. And in relation to the initial United States landings in the Dominican Republic, the justification of protection of nationals was indeed plausible. But beyond this, the Dominican case ceased to be one of protection of nationals.

The Mayaguez Incident, 1975[58]

The facts surrounding the Mayaguez incident have largely remained controversial. This, coupled with the fact that in the recent past there had also been hostilities of a wider scale between the states involved, significantly obscured the issue of protection of nationals.

The incident involved United States air, sea, and ground forces who on May 14, 1975 battled Cambodian troops on the Cambodian island of Koh Tang, and sank several Cambodian boats between Koh Tang Island and the Cambodian mainland port of Kampong Som (Sihanaukville). The fighting followed the Cambodian seizure on 12 May, of an American vessel, the

Mayaguez, with a crew of 39 men. The seizure had taken place 60 miles off the Cambodian coast and about 8 miles from the Wai Islands (claimed by both Cambodia and South Vietnam). The Mayaguez and all its crew were freed on the night of 14 May although the fighting continued up to May 15.

According to the Cambodian Government, the Mayaguez was one of several United States or Thai vessels that had been suspected of spying in Cambodian territorial waters. The Cambodian Information Minister said in a Phnmpemh broadcast that the United States had been "systematically spying" on Cambodia since the Khmer Rouge had captured Pnompenh, in April, 1975. The minister claimed that his government had decided to release the Mayaguez only because his country did not want to risk any military confrontation with the United States.[59]

The United States, on the other hand, claimed that the Mayaguez was a merchantship and was carrying innocent merchantmen when it was seized by the Cambodian authorities "in clear violation of international law". The United States official position was that its action against Cambodia constituted a measure of legitimate defence of American lives and property in accordance with Article 51 of the United Nations Charter.[60] In this claim, the United States had the support of the Japanese Deputy Minister of Foreign Affairs, who characterized the operation against Cambodia as "a just action for the rescue of Americans from piracy".[61] The operation was also viewed favourably by the British and West German Governments.[62]

Some aspects of the operation, however, made the declared objective of retaking the Mayaguez and its crew suspect. Indeed, even within the United States, there were fears that the operation may not have been motivated purely or even primarily by the humanitarian desire to protect American lives and property.[63] First: the United States does not appear to have demonstrated much zeal for utilizing diplomatic channels in its attempt to gain the release of the Mayaguez and its crew. Military operations against Cambodia were already underway even during the so-called "60 hours of diplomacy" in which the United States, through the Chinese Government and the United Nations Secretary General, had demanded the release of the Mayaguez and the crew.[64] Secretary of State Kissinger contended that these initial operations were necessary to prevent the crew from being taken to the mainland where a rescue operation would be more difficult. It must be noted, however, that these initial operations involved the strafing of vessels between the mainland and Koh Tang Island. There was every likelihood that the Mayaguez crew would have been killed in the process,[65] and Secretary of State Kissinger admitted this. Such disregard for the safety of the crew, even taking into account that injury to the nationals being rescued may be an inevitable risk of such operations, makes it less convincing that the wellbeing of the crew was the principal impetus behind the operation. The Secretary of State also referred to the fear of being drawn into "a negotiation over a period of months over the release of people that they (the Cambodians) had no right to seize to begin

with."[66]

> We believe that we had to draw a line against illegal actions and, secondly against situations where the United States might be forced into humiliating discussions about the ransom of innocent merchant men.[67]

The expressed fear of being drawn into negotiations for the release of the crew tends to show that the United States Government did not really believe that the members of the crew were in any immediate danger of fatal injury. Secondly, the main thrust of the operation took place when the Cambodian Government had already announced its readiness to release the vessel. Was it not inconsistent with the professed object of freeing the Mayaguez and its crew to continue with the operation even after the Cambodian announcement? To this question, the Secretary of State replied that

> . . . to stop all operations on the basis of a radio broadcast that had not been confirmed, whose precise text we did not, at that moment have - all we had was a one-page summary of what it said - a broadcast moreover, that did not say anything about the crew and referred only to the ship, it seemed to us it was too dangerous for the troops that had already been landed to stop the operation.[68]

Still, the announcement should have indicated to the United States Government that the crew was in fact already on the mainland and not at Koh Tang Island where the fighting was centered.[69] It is not really possible to determine the facts. Indeed, the suspicion, which was strongly denied by Secretary of State Kissinger, that the United States may have had other broader political motives for the operation, tended to be heightened by the statements of certain United States officials who appear to have viewed the operation not simply as a

humanitarian one to save life and property, but as being essentially a prestige-booster. Thus, Senator Barry Goldwater expressed satisfaction that Ford had acted:

> . . . because this country needs an indication of strength and leadership in the President's office and he's finally come through with it. . . . I think other nations are going to leave us alone. . . . Had he not done what he did, every little . . . nation in the world would be taking shots at us.[70]

And Secretary of Defence, James Schlesinger, tended to emphasize the punitive rather than the humanitarian character of the operation. The Secretary described the operation as an eminently successful one: ". . . incorporating the judicious and effective use of American force for the purposes that were necessary for the well-being of this society. . . ." and representing ". . . a much needed and timely reaffirmation of the freedom of the seas and a firm and measured response to the high-handed and crude use of force."[71] These statements tended to suggest that the United States had been looking for an opportunity to prove American military credibility and restore its morale. This feeling was echoed by West German Foreign Ministry officials who noted on May 15 that Bonn had "a certain interest in seeing the American trend to dejection and discouragement in foreign affairs come to an end."[72]

Criticisms of the operation were mostly presented in the context of the broader political issues relating to the United States involvement in the Indochina conflict.[73] In most of these criticisms the "protection of nationals" was either regarded as a mere "pretext" for an armed "intervention" in

Cambodia, or was not mentioned at all. Thus, it was only in the United States key official statements and in some statements by American allies that the justification of protection of nationals was presented as a central element of the Mayaguez operation.

The Entebbe Rescue Operation, 1976[74]

An Air France plane that left Tel Aviv, Israel, with over 250 passengers and a crew of 12 aboard was hijacked on June 27, 1976 over Greece after leaving Athens Airport. The hijackers forced the plane to land first at Benghazi Airport in Libya, and then at Entebbe Airport in Uganda. Acting for the Popular Front for the Liberation of Palestine (P.F.L.P.), the hijackers announced their demands which included the release of several people jailed in Israel, West Germany, France, Switzerland, and Kenya for terrorist activities. After being held for two or three days, 147 non-Israel (non-Jewish) passengers were released by the hijackers. The hijackers threatened to kill the remaining Jewish passengers should their demands not be met. On the night of 3-4 July, 1976, Israel, without Ugandan consent, flew two transport planes and soldiers to Entebbe. After a brief fight between the Israelis on the one hand, and the hijackers and Ugandan soldiers on the other, the remaining hostages, and the crew were flown back to Israel where their journey had started. Three hostages, one Israeli soldier, about twenty Ugandan soldiers and all the hijackers (except perhaps one who was rumoured to have been captured by the Israelis) were

killed in the fight.[75]

As far as the present study is concerned, the Israeli rescue operation may be regarded as one of the most important post-1945 cases of protection of nationals abroad. The case was an ideal one for the consideration of the legal question concerning the admissibility of the use of force in the protection of nationals abroad. For in this case, the justification of protection of nationals was clear-cut and was not confused by other broad averments. There was little room for the allegation that protection of nationals was a mere pretext. If there was any important legal question to consider in the Entebbe case, it was whether or not a state could lawfully land its forces on foreign territory for the purpose of protecting its nationals, and if it could, under what circumstances. It is also the detailed manner in which the Israeli Government, and those who supported it, dealt with these questions that makes the Entebbe operation an important one.

The Israeli Government specifically viewed its action as a legitimate exercise of the right of self-defence. Chaim Herzog, the Israeli Ambassador to the United Nations, stated in the Security Council that:

> The right of self-defence is enshrined in international law and in the Charter of the United Nations and can be applied on the basis of the classic formulation as was done in the well-known Caroline Case, permitting action where there is a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation. That was exactly the situation which faced the Government of Israel.[76]

The United States representative, Ambassador William Scranton, expressed the same view and explained that

> . . . there is a well established right to use limited force for the protection of one's own nationals from imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the right of self-defence, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.[77]

In one aspect, however, the position of the United States appears to have varied from that of the Israeli Government. The Israeli Ambassador denied that the Israeli action at Entebbe in any way violated the Charter of the United Nations in particular its Article 2(4).[78] Scranton, on the other hand, expressed the view that

> . . . Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be inadmissible under the Charter of the United Nations.[79]

The United States representative appears to have viewed the temporary landing at Entebbe as constituting a violation of the "territorial integrity" of Uganda. This is indeed a somewhat surprising view from the United States which in the past persistently characterized such temporary landings as mere "interpositions of temporary character".[80] It is not very likely that by qualifying the Israeli action as a "temporary" violation, Scranton meant to distinguish the operation from acts contemplated under Article 2(4) of the Charter; for he expressly stated that the action would normally constitute a breach of the Charter. All the same, the ultimate view of the United States was that the Israeli operation was permissible by

international law.

It is significant that both Israel and the United States stressed the high standards required for such action. Herzog referred to the demanding requirements of "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."[81] And Scranton emphasized that the assessment of the legality of Israeli actions depended heavily on the unusual circumstances of that specific case.[82] Indeed, in the Entebbe operation, the theoretical conditions governing the use of force in the protection of nationals abroad appeared with much more clarity than in any other post-1945 instance of protection of nationals abroad. On the whole, there could be little doubt first, that the lives of the Israeli hostages at Entebbe were in grave danger. The hijackers had unequivocally manifested their intention to execute the hostages. Israel had good reason to believe that its nationals were in imminent danger of execution. The fact that hostages of other nationalities had been released, by reducing the risk of any direct confrontation between the hijackers and many other governments, could only reinforce the likelihood that the hijackers were going to carry out their threat. At the time of the operation, the deadline set by the hijackers for the execution of the hostages was perilously close.

Secondly, it was not evident that the Ugandan Government was willing or able to protect the hostages.[83] On the contrary, much of the evidence indicated that the Ugandan President, Idi Amin, collaborated with and aided the hijackers. As the

Israeli Ambassador pointed out, the landing of the hijacked plane at Entebbe appeared to have been a previously prepared plan: at Entebbe, the hijackers were met by a reinforcement of heavily armed terrorists who had been waiting for the arrival of the plane; President Amin had himself come to greet and welcome the hijackers to whom he promised support and assistance. During their detention at Entebbe, the hostages were guarded not only by the hijackers, but also by Ugandan soldiers.[84] The released non-Israeli hostages described how Ugandan soldiers under direct orders of President Amin, supervised the separation of Israeli hostages from non-Israeli passengers. It was rightly observed by the Israeli Ambassador that by its conduct, the Ugandan Government violated a basic principle of international law and obligations undertaken under the 1970 Hague Conventions on the Suppression of Unlawful Seizure of Aircraft (hijacking)[85] which had been ratified both by Uganda and Israel. Thirdly, in view of the fact that there were no assurances from the Ugandan authorities - in fact Amin was openly urging the Israeli Government to comply with the demands of the hijackers - about the safety of the hostages, and that the moment had almost arrived when the hijackers would carry out the executions, it could not realistically be contended that Israel had any choice of means. Collective action under the United Nations, even if possible, would not have been prompt enough to save the lives of the hostages. The necessary deliberations that would have preceded such an action would have removed the element of surprise necessary for such

action. It cannot be argued that the Israeli Government should have acceded to the demands of the hijackers rather than take the extraordinary measures it did. Such a course of action would have been dangerous. As the United States Ambassador pointed out:

> No state is required to yield control over persons in lawful custody in its territory under criminal charges. Moreover, it would be a self-defeating policy to release prisoners convicted in some cases of earlier acts of terrorism, in order to accede to the demands of terrorism.[86]

Indeed, it cannot be supposed that the requirement that there must be no alternative means of protection means that even the most costly means must be attempted before resorting to force.[87] In any case, it was not all in the power of the Israeli Government to satisfy the hijackers' demands. These demands included the release of certain prisoners that were under the custody of other governments. The Israeli Government could not compel these governments to release their prisoners.

And lastly, the actual operation at Entebbe can hardly be said to have gone beyond the measures necessary for the freeing of the hostages. The operation was brief and the Israelis left as soon as this objective was accomplished. True, several Ugandan soldiers were killed and much Ugandan property was destroyed. But the action which led to these losses was part and parcel of the rescue operation and was not directed at any independent objective.[88]

In their communications to the United Nations and in their statements during the Security Council debate over the

operation, Uganda, several members of the O.A.U., a number of Arab states and states of the communist bloc, charged Israel with "aggression", violation of Uganda's "territorial integrity" and simply of violation of "international law".[89] These charges were not, unfortunately, accompanied by any detailed discussion of the law. In particular, the charges contained no specific rejoinder to Israel's interpretation of the Charter and of the right of self-defence. In general, however, these countries did reject the admissibility of the right of a state to use force in the protection of its nationals within foreign territory. Several of these states, while declaring their condemnation of the initial act of terrorism, expressed the view that even such an act did not entitle Israel to land its troops in Uganda.[90] It was contended that the principle of sovereignty could not be subordinated to the principle of human freedom, that a state cannot violate the sovereignty of another state in order to secure the freedom of its own citizens. It was constantly observed that if such a right were admitted it would naturally be reserved only for the powerful states and would easily undermine the principle of sovereign equality. These countries accordingly urged the Security Council to condemn the operation and compel Israel to pay full compensation for the damage to life and property caused during the invasion. It is possible that some of these countries believed the Ugandan claim that President Amin was in the process of negotiating the release of the hostages when the Israelis landed, but most of these

countries would appear to have simply ignored the fact that the Ugandan Government might have been implicated in the initial terrorist act.

The Israeli operation was not officially condemned by the Security Council. The sponsors of a draft resolution to condemn Israel refrained from pressing for a vote. Very likely, it was sensed that the draft resolution was going to be defeated.[91] It is, however, also possible that the sponsors of the draft resolution, having achieved their political aims in their individual statements, did not want to go as far as officially condemning Israel for the rescue operation. The decision not to press for a vote on the draft resolution might well have also been a discrete censure of Uganda's role in the affair.

The United States' Attempted Rescue Operation in Iran, 1980[92]

The following discussion is concerned with the legal aspects of the United States' military operation of 24-25 April, 1980, and not with the entire crisis of the American hostages in Iran.[93] It must be emphasized in particular that no attempt will be made to consider in any detail Iranian allegations against the late Shah Mohammed Reza Pahlavi and the United States, or to discuss the legal implications of the agreements which finally led to the release of the 52 American hostages.[94] As such, only the following facts need be related.

On 4 November, 1979, thousands of demonstrating Iranian

militants overran the United States Embassy in Tehran, Iran. In the course of the attack, all diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy Compound. Subsequently, other members of the United States Mission seized elsewhere in Tehran were also detained as hostages. Thirteen of the hostages were released shortly after the seizure.[95] Fifty-three American hostages were still in the hands of the Iranians when on 24-25 April, 1980, the United States initiated a military operation designed to effect the rescue of the hostages. The operation was subsequently abandoned "for technical reasons", but after the United States military units had already entered Iranian territory.[96] About eight American soldiers were killed and several others were injured in an accident that occurred during the withdrawal from Iranian deserts.

The attempted rescue operation drew angry reactions from Iran and a number of other countries including the Soviet Union, Pakistan, India, Libya, South Yemen, and Romania.[97] On the whole these angry reactions have no direct bearing on the question of whether or not a state may legally use force to protect its nationals within the territory of another state. The statements by the countries were generally based on the questionable assumption that the release of the hostages was a mere pretext by the United States to invade Iran.[98] Iran herself characterized the attempted rescue operation as "an act of war against Iran" and warned of dire repercussions if such an operation were to be repeated.[99] Of some significance was

perhaps the view of Romania which, while condemning Iran's continued detention of the American hostages, said that such continued detention did not justify a violation of Iran's territorial sovereignty.[100]

The attempted rescue operation was never discussed before the Security Council although both Iran and the United States are members of the United Nations. However, the International Court of Justice felt compelled to comment on the operation in its judgement of May 24, 1980, in the Case Concerning United States Diplomatic and Consular Staff in Tehran.[101] The Court, while expressing much understanding for the United States' feeling of frustration over the continued detention of its nationals and its preoccupations with their well-being, severely criticized the operation. Again, however, the criticism of the main judgement of the Court had little bearing on the overall legality of the operation. Indeed, even if it had some bearing on the legality of the operation such criticism would have been strictly obiter. For as the Court itself pointed out

> . . . neither the question of the legality of the operation of 24 April, 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it [was] before the Court.[102]

The Court further pointed out that its criticism of the operation had no bearing on the evaluation of the conduct of the Iranian Government in relation to the seizure and detention of the nationals of the United States. What disturbed the Court was the fact that at the time of the operation the Court was still seized of the hostage issue and was in the process of preparing

its judgement adjudicating upon the claims of the United States against Iran.[103] The Court observed that

> . . . an operation undertaken in these circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations. . . .[104]

The Court also recalled its Order of 15 December, 1979,[105] enjoining the states concerned not to take any action which might aggravate the tension between them. The Court would appear to have been of the view that the United States' operation was contrary to this Order, although ironically, President Carter of the United States claimed that the operation was set in motion partly in the belief that the rescue of the hostages would alleviate international tensions.[106] With Iran's insistence that the hostage issue was only a marginal aspect of a more complex problem and consequent refusal to obey the Court's Order[107] to release the hostages, it might have been equally open to argue that the freedom to act had been restored to the United States.[108] The Court, however, seemed to have been of the opinion that despite Iran's rejection of the first judgement and the call by the United Nations for the release of the hostages, the United States was still to refrain from taking military action. It is also possible to view the Court's criticism of the rescue operation as a conciliatory gesture, influenced by the fact that the hostages were still in danger and by the hope that there was still room for a peaceful solution to the crisis. The Court's criticism might thus be considered as having more political than judicial

significance.[109]

The United States Government maintained that the attempted rescue operation was "in exercise of the inherent right of self-defence with the aim of extricating American nationals who [had] been and [remained] the victims of the Iranian armed attack on [the] Embassy."[110] It was denied that the operation constituted an act of war against Iran. President Carter explained that the operation was not a military one, that it was not a punitive or hostile raid on Iran, but a humanitarian attempt to rescue the hostages without bloodshed and in the process to eliminate the growing risk of confrontation that would lead to severe bloodshed.[111] Most United States' West European allies, Canada, Israel, and Egypt expressed sympathetic views about the attempted rescue operation.[112] Largely because of the delicate nature of the Middle East situation, the sympathy expressed by these countries was not in all cases wholehearted. There were some genuine fears that the use of military force to solve the hostage crisis might lead to a more general confrontation. And the United States' Western allies and Japan had gone some way in supporting the United States unilateral economic sanctions against Iran, more than likely, in the hope that such sanctions might obviate the need to resort to military force. Thus, some members of the British Labour Opposition Party urged the Government to withhold its cooperation with the United States on economic sanctions against Iran until the United States undertook to abstain from using military force to free the hostages.[113] It must be emphasized, however, that

there is no evidence to suggest that this reluctance to encourage the use of force to free the hostages was due to any recognition of a legal principle against such use of force. The reluctance appears to have been largely due to the practical considerations regarding the possible consequences of the use of force.[114]

It is necessary to assess the legal admissibility of the United States' attempted rescue operation, and the claim that the operation was an exercise of the inherent right of self-defence, in terms of the legal conditions governing the right of self-defence in the protection of nationals abroad.[115] The key questions to be asked are: was there any imminent threat of irreparable injury to the hostages? Were the local authorities of Iran unable or unwilling to protect the hostages? Were there no other less drastic means of securing the freedom of the hostages? Since the operation was abandoned in its early stages, the question regarding the limitation of the measures of force to the object of protecting the hostages does not strictly arise, although it can be observed that the revealed plan of the operation appears to have been consistent with the limited character of the mission.[116]

Neither does the question of whether or not the Iranian Government was unwilling or unable to protect the American hostages present any particular difficulty. Clearly the Iranian Government was unwilling to exercise its authority either to prevent or terminate the attack and seizure of the Embassy and its occupants,[117] even after being ordered to do so

by the Security Council and the International Court of Justice. The conduct of the Iranian Government, in fact, went beyond mere unwillingness or inability to protect the hostages. The subsequent actions of the Government amounted altogether to an endorsement of the seizure of the hostages. One early manifestation of official support for the militants' action related to three members of the United States Embassy Staff who, at the time of the attack, were visiting the Foreign Ministry in Tehran. Instead of being granted protection and allowed to leave, the Iranian Foreign Minister announced that if they attempted to leave the Ministry they would be arrested and handed over to the militants to join the other hostages. Almost immediately after the attack, the Foreign Minister announced that the action of the militants "enjoyed the endorsement and support of the government, because America herself is responsible for this incident."[118] The Ayatollah, Khomeini himself made several statements supporting the militants' demands and rebuking the hostages as "mercenaries" and "spies".[119] In fact, it was at the Ayatollah's own orders that the militants released the thirteen black or women hostages. In the subsequent negotiations to release the remaining hostages, the Government of Iran was as much an obstacle as the militants themselves. Iranian officials spurned calls both by the United Nations Security Council and the International Court of Justice for the immediate release of the hostages. Thus, at the same time of the attempted rescue operation, there could be no illusion as to the unwillingness

of the Iranian Government to secure the release of the hostages before the militants' demands were met.

Whether or not there was a threat of irreparable injury to the hostages, and whether or not there were less drastic alternative means of securing their release are related questions which may not be susceptible to clear-cut answers. Was there in the American hostage crisis a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation?" It may be argued that there was no such instant necessity of self-defence in the Tehran hostage crisis. It may be pointed out in support of this argument that the hostages have in fact been safely released. Their release came several months after the attempted rescue operation as a result of negotiations and agreements involving the United States, Iran and Algeria.[120] This may tend to show that in fact the hostages were not in any immediate danger of irreparable injury,[121] although admittedly the very act of their seizure and continued detention was a grave one. It also, of course, demonstrates that in fact there were possibilities of gaining the freedom of the hostages without the use of armed force.[122] Indeed, assuming that the paramount concern of the United States was the safety of the hostages, it may further be argued that at the time of the operation the relative advantages lay in restraint rather than in the resort to force. It is more than likely that had the operation not been abandoned, several or even all of the hostages would have been killed.[123] Death or injury on the part of the people being rescued may indeed be

said to be a natural risk of any rescue operation. However, if the only concern of a rescue operation is the humanitarian one of saving life, such a risk of death or injury to the people rescued, it may be argued, must be taken only if the only other alternative is certain or very probable death or injury at the hands of the captors.[124] This is perhaps where the Tehran situation may differ from the Entebbe one.[125] In the latter case, the hijackers set a deadline after which they clearly indicated their intention to execute the Israeli hostages. Time here was of the essence. The same may not be true of the Tehran case.[126] The militants did not set any deadline by which their demands should be met if they were not to try the hostages for alleged espionage charges. It might thus be said that the need on the part of the United States to resort to drastic measures was not as urgent as it was on the part of Israel in the Entebbe case. The United States' attempted rescue operation may accordingly be criticized as precipitous.

On the other hand, however, the fact that the hostages have now been safely released should not unduly influence the assessment of the character of the United States' decision to launch a rescue operation when it did. This would be to rely too much on hindsight. It is important to view the facts as they appeared on 24 April, 1980. By that time, the American hostages had been held in captivity for five months; and the Iranians showed no signs of relenting their demands. These demands included the return of the exiled Shah. The fact that

The Shah had already left the United States appeared to make no difference to the Iranians.[127] Efforts by the United Nations to secure the release of the hostages had proved ineffective An attempt by the Security Council to impose economic sanctions on Iran had been frustrated by a Soviet veto. A trip to Iran by the United Nations Secretary General, Kurt Waldheim, had failed to produce the desired results.[128] Iran ignored the Order of the International Court of Justice calling for the immediate release of the hostages. President Carter had also ordered various forms of pressure to be put on Iran,[129] all the while demonstrating a great deal of reluctance to resort to military force. Even more important, during their five months of captivity there had been little to reassure the United States Government with regard to the well-being of the hostages. During the early days of their captivity, they had been seen blindfolded and manacled. At the time of the operation, the hostages were still in the hands of fidgety militants. There was also at that time no clearly defined central authority with apparent ability to control the militants. Indeed, there were even signs of civil unrest in Tehran. In these circumstances, it was possible for the United States Government to feel a sense of alarm and urgency. It is hard to maintain that acceding to the Iranian demands would at that time have been a less costly policy choice than the resort to limited measures of military force. Iranian demands may indeed have been reasonable, deserving the sympathy of other countries. Yet, the method which Iran "chose" to enforce these demands was one

whose encouragement could only bring chaos in international relations. Of course, the United States has ultimately acceded to some of the demands in exchange for the hostages. The decision to yield to these demands was clearly influenced by the failure of the rescue operation. Short of a full-scale invasion of Iran, with all the unpredictable consequences, this was the only viable choice before the United States.[130]

An Overview of Post-1945 State Practice

It is clear from the foregoing examination of post-1945 state practice that the claim to the right to use force in the protection of nationals abroad has not been relinquished. Admittedly, only a limited number of states have actually exercised or claimed to have exercised this right. These include Belgium, France, Israel, the United Kingdom, and the United States.[131] It is indeed worth noting that the United States alone has been involved in five of the seven cases examined. Yet several other states have in principle also supported the continued existence of the right. Clear examples include Canada, Japan, Norway, Sweden, and the Federal Republic of West Germany. It is indeed significant that most of the states who admit the legality of the use of force in the protection of nationals abroad are those which have the military capability so as to protect their nationals. It means that the support for the right is hardly merely academic. As long as situations endangering nationals abroad continue to arise, the recognition of the right of forcible protection of

nationals abroad can easily be translated into action.

Opposition against the use of force in the protection of nationals within foreign jurisdiction is evident in the views expressed by many so-called Third World countries, the Soviet Union, and other countries of the communist bloc. Opposition by these countries to specific instances of use of force in the protection or alleged protection of nationals has not always necessarily or unequivocally indicated a rejection as a matter of principle of the right of forcible protection. In fact, the views of these states have generally shed little light on the interpretation of existing principles of international law relative to the use of force, in particular, of the relevant provisions of the Charter of the United Nations. Most of the cases in relation to which states have expressed their views have also involved broader political questions. And these questions have often tended to obscure the views of states on the particular subject of protection of nationals. The fact that these instances have almost invariably been debated in essentially political rather the judicial forums has compounded this handicap. Vague references to "aggression", "interference in the internal matters of independent states", "invasion", or to "violation of the Charter", which have been employed to characterize particular instances of resort to force in the protection of nationals abroad have done little to remedy the situation. Without any objective machinery for the determination of questions of fact, the legal question relating to the admissibility of the right of forcible protection of nationals

abroad has further been obscured by conflicting factual accounts of alleged instances of protection. In most of the cases examined, it has been difficult to tell whether the states condemning the resort to force have done so on the basis of a different appreciation of the facts or on the basis of a different understanding of the legal principles involved. This was the case, for example, in the Stanleyville, Mayaguez, and even Entebbe situations.

In general, however, these states have sufficiently indicated that as a matter of international policy, they stand opposed to the practice of protecting nationals abroad by the use of force. The Soviet Union, in particular, has often reiterated its opposition to any principle allowing such methods of protection. Third World countries continue to associate the right of forcible protection of nationals abroad with "gun boat diplomacy", imperialism, and colonialism. Obviously, these states also realize that the right of forcible protection of nationals may only be available to powerful states against weak ones. Indeed, between countries where there is only a marginal difference of strength, such use of force is almost impracticable,[132] unless a major confrontation is intended. Thus, the right of forcible protection of nationals abroad is seen as undermining the principle of equality among nations and as a threat to the already fragile sovereign and independent character of most of these Third World countries. The history of the right of forcible protection could only increase these fears.[133] In the practice of powerful states

during the nineteenth and early twentieth centuries, "protection of nationals" was an amorphous phrase which was often employed as a shorthand for describing a variety of state interests, including selfish interests of doubtful legality. Before the outbreak of the Second World War, Japan invoked the justification of protection of nationals to occupy large tracts of Chinese territory.[134] The protection of Sudeten Germans paved the way for Hitler's invasion of Czechoslovakia.[135] The claims of the British and French governments in connection with the Suez invasion[136] could also only serve as reminders that the danger of abusing the right of protection of nationals abroad may still be present.

This atmosphere of resentment against the use of force in the protection of nationals abroad is likely to have contributed to the conception of the right of protection of nationals abroad as a very exceptional one. For example, the Israeli Ambassador, Herzog, quoting Webster, referred to the demanding requirement of ". . . a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."[137] With the exception of the Suez invasion, the United States' landings in Lebanon, and the later stages of the United States' occupation of Santo Domingo, post-1945 instances of the use of force in the protection of nationals abroad have, generally, and in varying degrees, involved a threat of mortal danger to the nationals protected. None of these instances took a purely punitive or retributive character. None of these involved merely the protection of

property. Neither did any of these instances result in permanent occupation of territory. In other words, post-1945 state practice relative to the use of force in the protection of nationals abroad indicates a great measure of discipline on the part of the intervening states, a measure of discipline which was conspicuously absent in the erratic practice of the nineteenth and early twentieth centuries.

States resorting to force in the protection of their nationals abroad have viewed such protection as a measure of the right of self-defence which is reserved, expressly or implicitly, under modern prescriptions against the use of force. The use of force in the protection of nationals abroad has also sometimes been characterized as a "humanitarian" as opposed to a "military" action. During the Stanleyville landings, for example, the United States and Belgium stressed that the landings were "humanitarian" and not "military"[138] operations. This characterization was again stressed by the United States in connection with the attempted rescue operation in Iran.[139] The characterization has clearly been intended to negative any belligerent intentions on the part of the states resorting to force, and does not appear to have anything to do with the technical justification of "humanitarian intervention". In the course of protecting their nationals, the intervening states have often also rescued aliens of other countries. This was, for example, the case in the Stanleyville and Entebbe operations. However, such protection of aliens was clearly only a "bonus". It did not involve any extra

measures, but was achieved by the same measures which were primarily aimed at effecting the protection of nationals. Thus, these cases cannot wholly be relied upon as precedents of humanitarian intervention.[140] There has as yet never been any case of country A landing troops in country C purely and primarily for the purpose of protecting B's nationals.

NOTES: CHAPTER 5

[1]For indeed, whatever may be the theoretical conclusions about the legal status of the use of force in the protection of nationals abroad, in the final analysis what matters most are the actual views of states on the subject. See Hyde, International Law Vol. I, (1951, 2nd ed.), pp. 11-12.

[2]Documents on Foreign Affairs 1956, p. 73 seq.; Q. Wright, "Intervention 1956", 51 A.J.I.L. (1957), p. 257; J.E.S. Fawcett, "Intervention in International Law: A Study of Recent Cases", 103 R.C. (1961, II), p. 347 at 391 seq.; Thomas Huang, "Some International and Legal Aspects of the Suez Question", 51 A.J.I.L. (1957), p. 277; Harris, Cases and Materials on International Law (1979), p. 681. Whiteman, 12 Digest, p. 200; L.C. Green, "Armed Conflict, War and Self-Defence", 6 Archiv. des Volkerrechts (1956-57), p. 386 at 425 seq.

[3]Documents on Foreign Affairs 1956, pp. 307-341; Wright, op. cit., p. 272; Fawcett, op. cit., p. 400; see also Whiteman, 12 Digest, p. 200.

[4]Parl. Deb., H. of C., 5th Ser., dlviii, col. 1277.

[5]Hansard, H. of L., vol. 199, cols. 1348-1359, Nov. 1, 1956.

[6]Ibid.

[7]Ibid. The Viscount did not give any details.

[8]Hansard, H. of L. Deb, 5th Series, cols. 659-660, Sept. 12, 1956.

[9]Statement by the Soviet Government, 15th Sept. 1956, see Documents on Foreign Affairs, 1956, p. 223.

[10]See Documents on Foreign Affairs, 1956, p. 243.

[11]Documents on International Affairs 1958, p. 287; Whiteman, 5 Digest, p. 519; Pittard Potter, "Legal Aspects of the Beirut Landings" 52 A.J.I.L. (1958), p. 727; Q. Wright, "Intervention in Lebanon" 53 A.J.I.L. (1959), p. 112. See also

Brownlie, op. cit., pp. 294, 322 and 326.

[12]Documents on International Affairs, 1958, pp. 287-88.

[13]Documents on International Affairs, 1958, p. 289.

[14]Documents on International Affairs, 1958, p. 295.

[15]Documents on International Affairs, 1958, p. 287.

[16]Ibid.

[17]38 Dept. of State Bull., (n. 989), p. 947.

[18]See e.g. Brownlie, op. cit., p. 294.

[19]See Offutt, op. cit., generally; Thomas and Thomas, Non-Intervention (1956), pp. 15-54, 303-58. For recent U.S. practice relative to the protection of nationals abroad see the Mayaguez Case, n. 58 of this chapt., and the Iran Case n. 92 of this chapt. See also views of U.S. govt. on the Entebbe raid, nn. 77-9 of this chapt.

[20]Statement by the Government of the Soviet Union regarding the events in the Middle East, 16 July, 1958. See Documents on International Affairs, 1958, pp. 289-90. The Statement of the Chinese Government appears at p. 293 of the same source.

[21]To a large extent, this appears to be true with the case under consideration.

[22]See e.g. U.N. General Assembly Resolution on the Lebanon and Jordan, Res. 1237 (E.S. 111) G.A.O.R., Third Emergency Special Session, Suppl. No. I (A 13905); Documents on International Affairs, 1958, p. 327.

[23]Letter of Oct. 8, 1958, see Documents on International Affairs, 1958, pp. 329-30.

[24]U.N. Yearbook, 1964, p. 95; Louis B. Sohn and Thomas Buergenthal, International Protection of Human Rights (1973), p. 195; Richard Lillich, 53 Iowa Law Review, p. 325; Whiteman, 5 Digest, p. 209; 3 African Institute Bulletin, 3 Feb., 1965, No. 2, p. 31. See also King Gordon, U.N. in the Congo (1962); L.B. Sohn, Cases on United Nations Law (1967), pp. 706-63; Reuters Guide to the New Africans, (1967), p. 75; Ian Colvin,

The Rise and Fall of Moise Tshombe (1968).

[25]See Evans and Murphy, Legal Aspects of International Terrorism (1978), p. 36.

[26]See U.N. Yearbook, 1964, p. 96; 3 African Institute Bulletin, p. 33; Sohn and Buergenthal, op. cit., pp. 199-201. To most of these states, Tshombe was merely a vehicle used by Belgium and her allies to "re-colonize" the Congo. The rebels fighting in Stanleyville were viewed as patriotic men fighting for their country. Thus, the late President Tito of Yugoslavia remarked in his address to the League of Yugoslav Communist that,

> "In the Congo the people were fighting a bloody and fierce battle against Tshombe's anti-people's regime and against aggression by certain Western countries" [see 3 African Institute Bulletin, p. 33].

There was a strong belief among these countries that in authorizing the operation Tshombe had been motivated by the desire to facilitate his drive against the rebel army.

[27]This point was perhaps given the strongest emphasis by the Nigerian Government, one of the few African Governments that looked favourably at the operation, in the U.N. Security Council debate. See U.N. Yearbook, 1964, p. 98.

[28]Letter from the U.S. Representative to the President of the Security Council, 24 Nov., 1964. U.N. Doc. S/6062; SCOR, suppl. for Oct.-Dec. 1964, pp. 186-9.

[29]Whether, however, the actions of the rebels constituted a violation of the Geneva Conventions, 1949, raises the question of the extent to which a rebel group like that in Stanleyville could be said to be bound by the Geneva Conventions. Those Conventions refer to "armed conflict of an international character" (see common Art. 3). In arguing that the rebel group had violated the Geneva Conventions, the rescuing powers implicitly attached to the rebel group attributes which debarred them from claiming that they had landed in Stanleyville on the express authority of a government which had competence to give such authority. The claim that the rebel group was bound by the Geneva Conventions tended to attach the attributes of a state to the rebels, and these attributes included control over some defined territory - in this case the Stanleyville area. Genuine authority to land in Stanleyville could therefore only be that of the rebels and not the Tshombe Government.

[30]Note of the Belgian representative to the President of the Security Council, 24th Nov., 1964, U.N. Doc. S/6063; SCOR,

suppl. Oct.-Dec., 1964, pp. 189-92. The United Kingdom representative stated in the Security Council that his government had permitted Belgium and the United States to use the Ascention Airport because it had clearly understood that the object of the operation was solely one of saving lives. "For the United Kingdom to have refused the request would have been a shameful act", the representative said. See U.N. Yearbook, 1964, pp. 97-8.

[31]See U.N. Doc. S/6068; SCOR Suppl. Oct.-Dec., 1964, p. 195. Some members of the O.A.U. contended, however, that the killings alleged had been precipitated by the rescue operation. See U.N. Yearbook, 1964, p. 96.

[32]Memorandum (by 22 member states) to the President of the U.N. Security Council. U.N. Doc. S/6076 and Add. 1-5, SCOR Suppl. Oct.-Dec., 1946, pp. 198-200.

[33]See n. 28 of this chapt.

[34]See e.g. Franck and Rodley, op. cit., pp. 288-89.

[35]See U.N. Yearbook, 1964, pp. 97-8.

[36]Belgium had vital interests in the Congo, especially in the copper-rich province of Katanga. Belgium's support for Tshombe's successionist Katanga Province was generally interpreted as a bid to preserve Belgium's mining interests in the Province. On several occasions before 1964, but after Congo had already become independent, Belgian troops had in fact been landed in the Congo on various pretexts including the protection of nationals. The possibility that Belgium might attempt to regain her hold over the Congo had posed a constant problem, both for the U.N. and the O.A.U. [See L. Sohn, Ten Cases for the United Nations (1968), p. 222 seq. 1, also King Gordon, op. cit., generally].

[37]See U.N. Doc. S/6055; 19 SCOR, Suppl. Oct.-Dec., 1964, pp. 64-6.

[38]See e.g. Sohn and Buergenthal, op. cit., p. 195; op. cit., p. 325.

[39]See U.N. Doc. S/6063; SCOR, Suppl. Oct.-Dec., 1964, pp. 189-92, and 51 Dept. State Bull. 841 (1964).

[40]52 Dept. Bull. p. 17.

[41]U.N. Yearbook, 1965, p. 140; Louis B. Sohn, The United Nations in Action (1968), p. 354; Thomas and Thomas, The Dominican Republic Crisis 1965 Ninth Hammarskjold Forum (1967); Lillich, 53 Iowa L.R., p. 341; Sohn and Buergenthal, op. cit., p. 306; 4 Int. L.M. (1965), p. 556.

[42]Before the landings, the U.S. Government had received a note from the military junta in Santo Domingo stating:

> "Regarding my earlier request I wish to add that American lives are in danger and conditions of public disorder made it impossible to provide adequate protection, I therefore ask you for temporary intervention and assurance, in restoring order in this country".

See 4 Int. L.M. (1965), p. 565. Thomas and Thomas note that:

> "The request for assistance has been a subject of controversy. Senator Fulbright alleges that the junta (the faction that sent the note) desired the intervention to prevent a communist takeover, but the United States refused to honor (the) request unless it was couched in terms of the necessity of protection of United States' citizens."

Op. cit., p. 75 n. 10. Indeed, the opening words of the note quoted above strongly suggest that the protection of American citizens formed a secondary reason for the request for U.S. intervention. It must be noted in connection with this role that the junta was not at the time of the request the ruling authority of the Dominican Republic. Some authority which could be identified in the Lebanon and certainly in the Congo cases was entirely absent in the Dominican case.

[43]Documents on American Foreign Relations, 1965, p. 234.

[44]N.Y. Times, May 1, 1965, p. 6 col. 4.

[45]"The Dominican Situation in the Respective of International Law", 53 Dept. State Bull., 1965, pp. 60-61.

[46]Security Council Debate, 3-4 May, 1965, U.N. Yearbook, 1965, p. 141.

[47]Documents on American Foreign Relations, 1965, p. 241.

[48]Op. cit., p. 242.

[49]See Facts on File, 1965, pp. 151, 153.

[50]Documents on American Foreign Relations, 1965, pp. 243-53.

[51]Documents on American Foreign Relations, 1965, p. 245.

[52]U.N. Yearbook, 1965, p. 141. Some U.S. officials were very critical of this claim of a possible communist takeover. Sen. Fulbright was, for example, later to criticize the Government for "exaggerated estimates of communist influence" in the Dominican cris. see Congressional Record, Sept. 15, 1965, pp. 22998-23005.

[53]For example, France, Jordan, Lalaysia, Uruguay, and, of course, the U.S.S.R. and Cuba. See U.N. Yearbook, 1965, pp. 141-43.

[54]The Soviet Union, Cuba and Uruguay did not think that even the O.A.S. was competent to act. This view was largely influenced by the belief that other members of the O.A.S. had been coerced and dictated to by the U.S., or at least that these other members had not been consulted beforehand. [See U.N. Yearbook, 1965, pp. 140-42]. Indeed, the Dominican crisis does exhibit some difficulties that may accompany humanitarian intervention through a regional organization in which one state is much more powerful than the rest of the members of the organization. The possibility is great that such a powerful member may use the organization for its own political objectives. The interventions in Hungary and Czechoslovakia are other examples.

[55]See statement by Ambassador Stevenson, U.N. Yearbook, 1965, p. 141; also by Under Sec. of State, Thomas Mann, N.Y. Times, May 9, 1965, p. E3. An Inter-American Peace Force (I.A.P.F.) was created in May in pursuance of a resolution adopted at the 10th Meeting of Consultation of Ministers of Foreign Affairs of the American States, 6 May, 1965. [See Documents on American Foreign Relations 1965, p. 251]. In the preamble, the formation of the Inter-American Force would ipso facto signify the transformation of the U.S. forces then in the Dominican Republic into another force that would not be that of one or a group of states, but that of the O.A.S. The object of the force was set in Article 2 as follows:

> This force will have as its sole purpose in the spirit of democratic impartiality, that of cooperation in the restoration of normal conditions in the Dominican Republic, in maintaining the Security of the inhabitants and the inviolability of human rights and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.

[56]U.N. Yearbook, 1965, pp. 140-42.

[57]U.S. Yearbook, 1965, p. 142.

[58]See Documents on American Foreign Relations, 1975, p. 157; Digest of United States Practice in International Law, 1975, p. 777; Eleanor McDowell, "Contemporary Practice of the United States Relating to International Law", 69 A.J.I.L. (1975), p. 861; Facts on File: Weekly World News Digest, 1975, p. 329; John Paust, "The Seizure and Recovery of the Mayaguez" 85 Yale L.J. (1975-76), p. 774; Harris, Cases and Materials in International Law (1979), p. 686.

[59]Facts on File, p. 331.

[60]See U.S. Report to the U.N. Sec. Gen., U.S. Mission to the U.N. Press Release, U.S.U.N. 40(75), May 14, 1975; also U.N. Security Council No. S/11689. See also Pr. Ford's Report to Congress, Documents (Ibid.), p. 159; and Statement by Sec. of State Kissinger, Documents (Ibid.), p. 170.

[61]Facts on File, p. 332.

[62]Ibid.

[63]See e.g. Documents on American Foreign Relations, 1975, p. 158.

[64]See also comments by Paust, op. cit., p. 798-99.

[65]See Paust, op. cit., pp. 779-80.

[66]Documents on American Foreign Relations, 1975, p. 168. Of course, on the other hand, the Cambodians might have believed that they had a right to seize and search a vessel suspected of espionage activities within what they considered to be their jurisdiction.

[67]Documents on American Foreign Relations, 1975, p. 164.

[68]Documents on American Foreign Relations, 1975, p. 166.

[69]The apparent attempt to stop the Cambodians from taking the ship to the mainland had failed. Thus during the main thrust of the U.S. operation, the crewmen were already on the Cambodian mainland.

[70]Facts on File, p. 331.

[71]Facts on File, p. 330.

[72]Facts on File, p. 332.

[73]See Facts on File, p. 332; also McDowell, op. cit., p. 862 containing a sharp criticism of the operation by the Thai Government. To execute the operation, the U.S. made use of the U Taphao air base in Thailand as a takeoff point. Prior Thai consent had not been sought. Public opinion in Thailand was that the seizure of the Mayaguez was used by the U.S. only as a pretext to intervene in Indochina [see Facts on File, p. 330]. The Thai Government would appear to have been bothered by the possible implication that, it had been aiding the U.S. in what might have been regarded as the invasion of Cambodia.

[74]See U.N. Yearbook, 1976, p. 315; 15 Int. L.M. (1976), p. 1224; Digest of United States Practice in International Law (1976), p. 149. Commentaries on the operation include the following: L.C. Green, "Rescue at Entebbe - Legal Aspects", 6 Israel Yb. on Human Rights (1976), p. 312; also "Humanitarian Intervention - 1976 Version", 24 Chitty's Law Journal No. 7, (1976), p. 317; Roderick D. Margo, "The Legality of the Entebbe Raid in International Law", 94 South African Law Journal (1977), p. 306; John Murphy, op. cit., p. 553.

[75]One hostage, an elderly lady who had earlier been taken from the airport building to a nearby hospital, was left behind. She was subsequently killed by Ugandans in reprisal. On May 14, 1981, Air France, after five years of discussion, agreed to pay £ 736,000 to Israeli survivors and heirs of the four Israeli civilians who were killed at Entebbe. The Iraelis claimed that tighter Air France security could have prevented the hijacking. See The Times of London, 18th June, 1981, p. 8, col. I.

[76]15 Int. L.M. (1976), pp. 1230-31.

[77]15 Int. L.M. (1976), p. 1232; U.S. Digest, p. 150. It is important to note how Ambassador Scranton almost consciously restricts the right to the protection of a state's own nationals. The right flows from the right of self-defence, and hence is not just based on a broad principle of protecting human rights in a foreign territory.

[78]See supra, chapt. 2; text to nn. 9-10.

[79]15 Int. L.M. (1976), p. 1232; U.S. Digest, p. 150.

[80]See supra, chapt. 2; text to nn. 52-3.

[81]See 15 Int. L.M. (1976), pp. 1230-31.

[82]U.S. Digest, p. 151. Herzog was directly quoting Webster re Caroline, see chapt. 3, n. 52.

[83]The Foreign Minister of Uganda claimed in the Security Council that Idi Amin, the Ugandan President, had throughout the episode been attempting to provide security to the hostages and obtain their release (U.N. Yearbook, 1976, p. 317). However, there was little evidence to support the claims of the Foreign Minister.

[84]The Ugandan Foreign Minister claimed that Ugandan soldiers were in fact placed at the airport to provide security for the hostages, but that the soldiers were not allowed by the hijackers either to come close to the hostages or to be heavily armed. The claim that the hijackers barred even Ugandan soldiers from coming close to the hostages is however, hard to believe considering that Ugandan officials, including doctors and the President himself (presumably accompanied by his bodyguards) had easy access to the building where the Israelis were being held.

[85]10 Int. L.M. (1971), p. 133. The U.S. representative made a similar observation.

[86]15 Int. L.M. (1976), p. 1232; U.S. Digest, p. 151.

[87]It may be observed that even in the recent case of the American hostages in Iran, the U.S. Government agreed to satisfy some demands of the Iranian captors only after the use of force had been attempted and had failed to secure the release of the hostages. True, the I.C.J. had in its first judgement virtually forbidden any of the parties to resort to any action that may aggrevate the situation. (See Int. L.M. (1979), p. 1644). Yet, neither could it be implied from the I.C.J.'s Order that the U.S. was in any way compelled to accede to Iranian demands. Moreover, independently of the Embassy seizure, some Iranian demands - e.g. the return of Iranian assets - constituted sound, justifiable claims and thus Iran may not be said to have benefitted entirely from its terrorist act. It may be said that Iran was only employing illegal methods to obtain what it was legally entitled to; it resorted to hostile measures even before attempting to press its demands peacefully. However, even then, there are compelling policy considerations for regarding the U.S. decision to accede to some demands of the Iranian captors as a dangerous one, perhaps justified only by the unusual delicacy of the situation in the Middle East.

[88]Much of the property destroyed consisted of fighter planes and it is possible that the Iraelis may have destroyed the planes to prevent any possible pursuit in view of earlier signs of Ugandan cooperation with the hijackers.

[89]See U.N. Yearbook, pp. 315-20.

[90]See for example, Statement by the Chinese representative, U.N. Yearbook, p. 318.

[91]The Western members of the Security Council, and these included three permanent members, were opposed to any move to condemn Israel. The U.K. and the U.S.A. who had prepared a draft resolution of their own in which they condemned hijacking were certainly going to veto any move to condemn Israel. Among the countries that were invited to participate in the Security Council (without vote), West Germany also spoke strongly against hijacking and expressed satisfaction that many lives had been saved by the Israeli operation. See U.N. Yearbook, pp. 318-19.

[92]See Case Concerning United States Diplomatic and Consular Staff in Tehran I.C.J. Rep. (1980), p. 3; 19 Int. L.M. (1980), p. 139; see also an earlier Order of the Court in 18 Int. L.M. (1979), p. 1644. See also Facts on File, 1980, p. 321.

[93]A broad range of legal issues relating to the Crisis are discussed by L.C. Green, "The Tehran Embassy Incident - Legal Aspects", 19 Archiv Des Volkerrechts, (1980), p. 1.

[94]These agreements appear in 20 Int. L.M. (1981), p. 258 seq.

[95]These consisted of blacks or women considered by the Iranians as being innocent of the "crimes" supposed to have been committed by the other hostages. One other hostage was released before the final settlement of the crisis, but after the attempted rescue operation. This hostage was gravely ill.

[96]At least officially, there was no contact between American soldiers and Iranian armed forces or other authorities.

[97]Facts on File, 1980, p. 324.

[98]See e.g. the statement by the official Soviet news agency, Tass (Facts on File, p. 324). Another accusation which

may have carried some force was that the operation was an election manoeuvre, that President Carter had authorized it for his own interests in the erstwhile forthcoming elections.

[99]See n. 97 of this chapt.

[100]See Facts on File, p. 324.

[101]I.C.J. Rep. (1980), p. 3. See in particular, para. 93 of the judgement.

[102]Para 94 of the judgement. C.f. Judges Taraz and Morozov in their separate opinions [see 19 Int. L.M. (1980), pp. 579-84].

[103]At an earlier date, 19 Feb. 1980, when the case had been ready for hearing, the United States had requested the Court to defer the hearing owing to the delicate stage of certain negotiations on the hostage issue. Subsequently, however, on March 11, 1980, the United States expressed anxiety to obtain an early judgement on the merits of the case. It was in response to this wish of the United States that the Court resumed its proceedings on 18 March, 1980.

[104]Para. 93.

[105]See 18 Int. L.M. (1979), p. 1644.

[106]See para. 32 of the 1980 judgement.

[107]See para. 10 of the judgement.

[108]See L.C. Green, 19 Archiv Volkerrechts p. 22. It may be of importance, however, that it was the United States that had initiated the Court's proceedings and therefore perhaps ought to have exhibited a greater measure of faith in the international judicial process.

[109]See Green, loc. cit.

[110]See I.C.J. judgement, para. 32.

[111]See n. 110. See also The Globe and Mail, 26 April, 1980, p. 6, cols. 1 and 2.

[112]See Facts on File, 1980, p. 324; also The Globe and

Mail, 26 April, 1980, 12 cols. 1-3.

[113]Facts on File, 1980, p. 324.

[114]Such considerations, including the fear that the rescue operation would result in much loss of life on the part of the hostages, forced Secretary of State Vance to resign in reaction to the decision to undertake the operation. (See Facts on File, 1980, p. 323).

[115]See chapt. 3 above, esp. text to n. 6.

[116]See Facts on File, 1980, p. 321 containing the description of the operation by the U.S. officials.

[117]See I.C.J. Judgement in The Case Concerning United States Diplomatic and Consular Staff in Tehran (1980) generally, and in part. paras. 62 and 95. It was the Court's finding that Iran's conduct constituted a violation of specific conventions binding between Iran and the United States and a violation of general international law. Article 22 of the 1961 Vienna Convention on Diplomatic Relations which is binding between the two countries states that:

> The receiving state (in this case Iran) is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

And after proclaiming that the diplomatic agent shall be inviolable; and that he shall not be liable to any form of arrest or detention, Article 29 of the Convention provides that:

> The receiving state shall treat him with a due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Iran's conduct was clearly not in accord with these provisions. It must also be noted that the Iranian Government violated not only principles governing diplomatic relations between states, but also principles relating to the protection of foreign nationals in general. [See chapt. 3 below, esp. text to n. 72].

[118]Cited by the I.C.J. in its Judgement, para. 70.

[119]See I.C.J. Judgement, paras. 70-73.

[120]See Settlement in 20 Int. L.M. (1981), p. 288.

[121]However, see below, text to nn. 127-30.

[122]Yet see n. 87 above.

[123]This was one of the reasons why Secretary Vance opposed the operation. He warned "that there was no way to get a rescue team into the middle of the city with thousands of demonstrators milling about, without getting the hostages killed in the process". See Americans in Captivity: Special Issue of the New York Times Magazine, Ser. 6, p. 78. Yet it is also worth noting that at the time of the operation no one really knew what the fate of the hostages would be in the hands of Iranians.

[124]However, it is not always that the only concern is the safety of nationals [see n. 87 above]. National honor and dignity may also be at stake.

[125]See n. 74 of this chapt.

[126]However, see below, text to nn. 127-30.

[127]Indeed, the Iranian insistence that the hostages would not be released if these conditions were not fulfilled was hardly consistent with the allegations of espionage. It must be noted that even if the Iranians were to substantiate their charges of espionage, this did not entitle them to seize and try diplomatic and consular personnel. There are other recognized remedies for such offenders, e.g. expelling them as personae non gratae. [For a close examination of this point, see Green. op. cit.].

[128]For some critical comments on Waldheim's trip to Iran, see Green, op. cit.

[129]First, Iranian assets in the U.S. had been frozen. Iranian diplomats and many other Iranians in the U.S. had been put in issuance and renewal to entry documents to Iranians. The president had also ordered the imposition of economic sanctions. In this last effort, U.S. Western allies and Japan had also gone some way in punishing Iran.

[130]The settlement was legally challenged by some U.S. citizens, but it has ultimately been upheld by U.S. courts.

[131]Germany (at Mogadishu, Somalia) and recently Indonesia have also used force to protect civilians against hijackers. These instances did not, however, involve any violation of another state's territorial sovereignty, since the local authorities consented to the landing of forces.

[132]Although not exactly a case of protection of nationals abroad, the disastrous Egyptian attempt to capture some wanted terrorists in Cyprus, provides a close example.

[133]See chapt. I above.

[134]See text to n. 43 of chapt I above.

[135]See text to n. 47 of chapt. I above.

[136]See nn. 4-6 of this chapt.

[137]See n. 81 of this chapt.

[138]See text to nn. 28 and 29 of this chapt.

[139]See n. 111 of this chapt.

[140]Unless of course one elects to treat the use of force by a state in the protection of its own nationals abroad as humanitarian intervention.

CONCLUSION

The development of modern international law, although leaning heavily against the unilateral use of force by states, does not warrant the conclusion that the use of force in the protection of nationals abroad is now legally prohibited. It is necessary to realize that the right of states to use force in the protection of their nationals abroad had been firmly established in the practice of states during the nineteenth and early twentieth centuries. This clearly puts a heavy burden of proof on those who argue that the right does not form part of present international law. There is nothing in the Charter of the United Nations nor in the general concepts of nonintervention and nonaggression that decisively renders support to the view that the use of force in the protection of nationals abroad, irrespective of the form it takes, is illegal. The International Court of Justice severely criticized the recent United States attempted rescue operation in Iran in its judgement in the Case Concerning United States Diplomatic and Consular Staff in Tehran. However, it would be dangerous to deduce anything general from this decision. The terms of the Court's criticism appear to be strictly confined to the particular circumstances accompanying the United States attempted rescue operation. The judgement has almost no bearing on the general question regarding the legal status of the use of force in the protection of nationals abroad under

international law.

Many powerful states continue to claim the existence of, and have on a number of occasions actually exercised, the right to protect their nationals abroad by means of force. These states have almost invariably associated such use of force with the right of self-defence which is unquestionably excepted under modern principles of international law limiting the freedom of states to resort to force in their international relations. The identification of the protection of individual nationals with the concept of state self-defence is in itself not a modern invention, nor is it peculiar to the field of use of force. The identification appeared in the writings of men like Grotius and Vattel, widely considered as the "founding fathers" of modern international law. It formed the basis of legal theory relative to the use of force in the protection of nationals abroad during the nineteenth and early twentieth centuries. It has also greatly influenced the development of the law of international claims. Admittedly, all particular post-1945 instances of protection of nationals abroad have been met with vigorous protests, especially from Third World countries and countries of the communist bloc. These protests, however, do not provide sufficient evidence of the establishment of a new customary international law rule against the use of force in the protection of nationals abroad. The views of these countries have generally taken vague and equivocal forms, and have in most cases been influenced more by considerations of political expediency than by firm legal convictions. As

long as situations endangering nationals in foreign countries continue to arise, and as long as international guarantees that such nationals shall receive due protection are not forthcoming, there is little reason to expect that the claim to the right to use force in the protection of nationals abroad shall be relinquished. Those who claim that such use of force is illegal under present international law have inevitably failed to identify other viable means of securing the safety of nationals whose lives are threatened in a hostile country, or in a country where the local authorities are either unwilling or unable to provide the necessary protection. Experience has shown that prompt and effective action by the United Nations Organization is still not, and may never be, a relevant factor in such situations. International law continues to operate in an essentially decentralized system. And in this system, forcible self-help cannot realistically be ruled out.

The conclusion that the right to use of force in the protection of nationals abroad has not been eroded by modern developments in international law does not, however, mean a reversion to the broad, if not vague, nineteenth and early twentieth centuries "right of intervention to protect nationals". The modern right of protection is defined in the context of principles enjoining states to refrain from the threat or use of force in their international relations. In this context, the right is necessarily exceptional, and its scope is very limited. There is ample authority and evidence supporting the claim that modern international law admits the

use of force in the protection of nationals abroad only where:

(i) there is imminent danger of irreparable injury to nationals in a foreign state,

(ii) the local authorities are either unwilling or unable to protect the threatened nationals,

(iii) there are no other less drastic means of protection and

(iv) the measures of protection must be confined to the purpose of protecting the endangered nationals.

These conditions are necessary if the right of protection of nationals abroad is to retain the characteristics of self-defence, and hence remain an exception to modern principles of international law limiting the freedom of states to resort to force. During the nineteenth and early twentieth centuries, "protection of nationals" was not confined to the evacuation of nationals from the country of danger. It extended to a variety of coercive measures, most of which had the inevitable result of impairing the territorial integrity and political independence of small or weak states. Such kind of measures are clearly outside the scope of the modern right of protection of nationals. It may be observed in this connection that all genuine post-1945 instances of protection of nationals abroad have taken the form of brief evacuations of nationals from the territory of danger to safety.

True, the justification of protection of nationals may be used by unscrupulous states as a pretext for accomplishing other less edifying objectives. For example, Japan invoked the

justification of protection of nationals to occupy large tracts of Chinese territory before the outbreak of the Second World War. Even in post-1945 state practice, there have been some instances of use of force by states which indicate that the justification may still be misused. This, however, is in itself no sufficient basis for rejecting the right of forcible protection of nationals abroad. It is submitted that insistence upon the governing conditions, and not a blanket rejection, of the right, would best serve the twin (but also sometimes conflicting) objectives of peace and justice. Such insistence upon the governing conditions, by implicitly recognizing that the use of force may be resorted to for just causes, is also more likely to generate moral pressure against abuses than indiscriminate condemnation of any instance of use of force.

Strictly construed, the right to use force in the protection of nationals abroad applies only to the protection of the nationals of the state resorting to force. Where the justification of protecting their own nationals has existed, however, states have in actual practice not hesitated to extend the measures of protection to nationals of other countries. Whether, however, without the initial justification of protecting its own nationals, a state would be equally entitled to use force in the protection of non-nationals abroad remains a troublesome question. The doctrine of humanitarian intervention provides a possible theoretical basis for the justification of such use of force. Yet, the doctrine does not

appear to have been firmly established in modern state practice. Indeed, the place of humanitarian intervention was not entirely certain even in the practice of states during the nineteenth and early twentieth centuries. Writers from the time of Grotius (1583-1645) to the present day have been divided on the issue. The link between the protection of non-nationals and the concept of collective self-defence appears to be somewhat tenuous. Arguments in support of the identification of the protection of non-nationals with the concept of collective self-defence are of a highly speculative nature; they have not had any clear support in actual state practice.

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